NO. 82-352

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner

versus

THE CITY OF PUEBLO, COLORADO, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented by the instant petition:

1. Does a general enabling statute such as Colorado Revised Statutes §41–4–101 grant a municipal corporation exemption from the federal antitrust laws?

2. Does the opinion of the Tenth Circuit in the instant case, 679 F.2d 805, create a conflict between the circuits in light of the opinion of the First Circuit in *Cory v. Look*, 641 F.2d 32?

3. Does the opinion of the Tenth Circuit in the instant case fly directly in the face of the holding of the Supreme Court in *Community Communications Co. v. City of Boulder*, 102 S.Ct. 835?

4. Is summary judgment an appropriate remedy in an antitrust suit where substantial questions remain for the trier of facts?

LIST OF ALL PARTIES TO THE PROCEEDING

All parties to the proceeding in this Court and in the court whose judgment is sought to be reviewed are:

1. Pueblo Aircraft Service, Inc., petitioner herein, appellant in the Court of Appeals, and plaintiff in the district court. Pueblo Aircraft Service, Inc., is a family business incorporated in Colorado, having no parent companies, subsidiaries or affiliates.

2. The City of Pueblo, Colorado, a respondent herein, appellee in the Court of Appeals, and defendant in the district court. The City of Pueblo is a municipal corporation incorporated in Colorado, having no parent companies, subsidiaries or affiliates.

3. Pan-Ark Aviation, Inc., a respondent herein, appellee in the Court of Appeals, and defendant in the district court. Pan-Ark Aviation, Inc., is a close business incorporated in Colorado, having no parent companies, subsidiaries or affiliates.

4. George Rabatin, Jr., a respondent herein, appellee in the Court of Appeals, and defendant in the district court. Mr. Rabatin is an officer of Pan-Ark Aviation, Inc., *supra.*

5. Thomas Lopez, a respondent herein, appellee in the Court of Appeals, and defendant in the district court. Mr. Lopez is a former director of aviation for the City of Pueblo.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Pueblo Aircraft Service, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals, reported at 679 F.2d 805 (1982), appears as Appendix A hereto. The opinion of the district court reported at 498 F.Supp. 1205 (D. Colo. 1980), appears as Appendix C hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered on 13 April 1982. A timely petition for Rehearing and Suggestion for Rehearing *en banc* was denied on 28 May 1982, and this petition is filed within 90 days of such denial. The denial of rehearing appears as Appendix B hereto. A copy of the Judgment and the Opinion, constituting the mandate, was transmitted to the United States District Court for the District of Colorado on 7 June 1982.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254 and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This case involves Colorado Revised Statutes §41–4–101, which provides:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the

> purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

Colorado Revised Statutes §41–4–101 is set out in Appendix D.

This case also involves the Sherman Act and the Clayton Act, 15 U.S. Code §§1, 14.

15 U.S. Code §1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, 15 U.S. Code § 1.

15 U.S. Code §14 provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether

patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act, 15 U.S. Code §14.

The Sherman Act and the Clayton Act, 15 U.S. Code §§1, 14, are set out in Appendix E.

STATEMENT OF THE CASE

The City of Pueblo, Colorado, is a home rule city. It owns and operates Pueblo Memorial Airport. The airport is located east of the City and is outside the corporate limits of the city.

Plaintiff, a Colorado corporation owned and operated by Willard J. Teel, and his wife, Betty I. Teel, operated a business on airport land leased from Pueblo between 1970 and June, 1977. Plaintiff's business consisted, among other things, of refueling aircraft, repairing and maintaining aircraft, and giving student flight instruction. A person who engages in such activities at an airport is referred to as a fixed

based operator, or "FBO." A fixed base operation is like a gas station for airplanes. In 1976, and during most of the time discussed, there were three fixed base operators at Pueblo Memorial Airport: Plaintiff; Flower Aviation; and Pan-Ark Aviation. The lease under which plaintiff operated required to purchase from the City of Pueblo all aviation fuel that it sold. Similar provisions were contained in the leases of the other fixed base operators, with the result that all competing FBOs at Pueblo Memorial Airport sold the same brand of gasoline.

Pueblo Aircraft Service's lease was to expire in March 1977. In December 1976, the city sent Pueblo Aircraft Service a letter advising that its leasehold would be put up for bid, but that the essential terms of the lease *would remain the same.* The city then put the leasehold up for bid with a requirement that the successful bidder *construct a new hangar.* The bid specifications also provided that if the successful bidder were an existing fixed base operator on the airport (translate "Pan-Ark"), the rent on such operator's pre-existing leasehold would be increased according to the terms of the bid. The requirement in the bid specifications that a new hangar be constructed, and the specific provisions in case the successful bidder were the holder of another lease on the airport, were significant departures from the city's letter representing that the essential terms of the new lease would remain the same.

Only two parties submitted bids for plaintiff's leasehold: plaintiff, and Pan-Ark Aviation, Inc. The City of Pueblo accepted the bid of Pan-Ark Aviation. Having lost their lease at the airport, plaintiff's business was destroyed and plaintiff was eliminated as a competitor at the airport in the areas of refueling aircraft, repair and maintenance of aircraft, and student flight instruction.

During discovery, it was learned that some time in late

1976 or early 1977 (shortly after the date on which the city sent Pueblo Aircraft Service the letter representing that there would be no major changes in lease terms), representatives of the city and Pan-Ark met and discussed Pan-Ark's desire to construct a new hangar, and Pan-Ark's desire to have more space on which to operate at the airport. Plaintiff's leasehold was adjacent to Pan-Ark's then-existing leasehold.

Thereupon, the terms of the new lease were formally announced, with specific provisions requiring the construction of the new hangar and specific terms allowing a bidder who is the holder of an adjoining leasehold on the airport (translate "Pan-Ark") to include an increase in rent on its pre-existing leasehold in its bid. Plaintiff feels this provision virtually ensured that the high bidder would be the holder of the adjoining leasehold.

The effect of this provision was to eliminate plaintiff as competitor at Pueblo Memorial Airport, and to grant Pan-Ark a virtual monopoly in major aircraft repair and student flight instruction at the airport.

Plaintiff filed suit in the United States District Court for the District of Colorado alleging antitrust violations. Jurisdiction was founded on 15 U.S. Code §15 and 28 U.S Code §1337. Plaintiff alleged that the lease clause which required it to purchase from the city of Pueblo all fuel for resale violated the Sherman Act, 15 U.S. Code §1, and the Clayton Act, 15 U. S. Code §14. Plaintiff alleged that the defendants had conspired to rig the bidding so that the defendant Pan-Ark Aviation, Inc. would have a decisive competitive edge and would be able to eliminate plaintiff as a competitor at Pueblo Memorial Airport in violation of the Sherman Act, 15 U. S. Code §1. Plaintiff further alleged that the simple act of leasing the land on which plaintiff had operated to its competitor and thus reducing the number

of competitors at the airport was an unreasonable restraint of trade in violation of the Sherman Act, 15 U.S. Code §1. Other claims for relief against other defendants were disposed of by stipulation or by the trial court and are not the subject of appeal.

The trial court ruled that since Pueblo was a Colorado home rule city, it was exempt or immune from the application of the antitrust laws under the decision of the Tenth Circuit Court of Appeals in *Community Communications Company v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980). It ruled that plaintiff had produced insufficient facts in light of its conclusion to defeat motions for summary judgment. Plaintiff appealed the summary judgment to the Tenth Circuit Court of Appeals and while the appeal was pending this Court decided *Community Communications Company v. City of Boulder*, 102 S. Ct. 835 (1982), ruling that home rule cities do not automatically enjoy exemption from federal antitrust laws.

The Court of Appeals ruled that, in spite of this Court's decision in *Community Communications v. City of Boulder*, Pueblo was still exempt from federal antitrust laws and affirmed the district court. As to the other defendants, the Court of Appeals ruled that summary judgment was proper on the merits.

ARGUMENT-REASONS FOR GRANTING THE WRIT

1. The Decision of the Tenth Circuit Court of Appeals In This Case Is In Direct Conflict With This Court's Ruling In *Community Communications, Inc. v. City Of Boulder.*

In *Community Communications, Inc. v. City of Boulder*, 102 S. Ct. 835 (1982), this Court in reversing the Tenth Circuit ruled that a municipality is exempt from the appli-

cation of federal antitrust laws only insofar as it is acting in accordance with a "clearly articulated and affirmatively expressed" state policy to "displace competition with regulation on monopoly public service." The Tenth Circuit had ruled that home rule cities within Colorado were exempt from the application of federal antitrust laws because the acts of a home rule city were equivalent to the acts of the State of Colorado. But this Court ruled that we are a nation of states, not of "city states." The simple fact that the state itself had expressed no opinion other than to delegate the matter to home rule cities did not constitute state action.

Yet right on the heels of the decision in *Community Communications, Inc.*, the Tenth Circuit now has ruled again that a general enabling statute such as C. R. S. 1973 §41–4–401 constitutes sufficient authority from the state to grant municipalities exemption from the federal antitrust laws. This statute makes no mention of monopoly public service or restricting competition. It sets forth no "clearly articulated" state economic policy. It simply authorizes municipalities to acquire land and to operate airports. Clearly this statute does not meet the requirements of *Community Communications Co., Inc., supra.*

But the opinion of the Tenth Circuit goes further. Reading the latter half of the opinion, the Tenth Circuit says that whenever a municipality is acting in a governmental (as opposed to a proprietary) capacity, the municipality is acting for the public at large and consequently is expressing state power and enjoys exemption from federal antitrust laws. This totally ignores this Court's rulings, not only in *Community Communications Co., Inc. v. Boulder, supra,* but also in *City of LaFayette v. Louisiana Power and Light Company*, 435 U. S. 389 (1978), and *California Liquor Dealers v. Metcal Aluminum*, 445 U. S. 97 (1980).

It is curious indeed that in reaching its rather startling conclusion, the Tenth Circuit chose to rely heavily on *Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966). The First Circuit itself recognized that that case no longer had vitality in light of this Court's recent decisions referred to above. *Cory v. Look*, 641 F.2d 32, 37 note 7 (1981).

Whether the opinion of the Tenth Circuit is taken in the narrower sense that an enabling statute such as Colorado Revised Statutes §41–4–401 grants that a municipality exemption from federal antitrust laws, or in the broader sense that any time a municipality acts in a governmental capacity it enjoys exemption from federal antitrust laws, the opinion clearly contradicts the ruling of this Court. On these grounds alone certiorari is proper under Rule 17.1 (c) of this Court.

2. The Decision Of The Tenth Circuit Court Of Appeals In This Case Is In Direct Conflict With The Decision Of The First Circuit Court Of Appeals In *Cory v. Look*.

As noted above, the Tenth Circuit now has ruled that a statute which merely authorizes municipalities to acquire and operate airports grants exemption from the federal antitrust laws to those municipalities for anticompetitive activities at airports. This directly contradicts the ruling of the First Circuit in *Cory v. Look, supra*. In that case the question involved alleged anticompetitive activity by the Woodshole, Martha's Vineyard and Nantucket Steamship Authority of Massachusetts (the Authority). Not unlike the case at bar, the Authority was charged with participating with other defendants in attempting to monopolize. The Authority was attempting to monopolize parking facilities by driving other parking lot owners out of business. The Authority argued that it had legislative authority to own and operate parking lots, citing a Massachusetts statute.

The First Circuit agreed that the Authority had power from the state legislature to own and operate parking lots. But the First Circuit said: ". . . this simply empowers the authority to behave as an ordinary economic agent; we see no necessary anticompetitive implication." 641 F.2d at 37. The court looked for some "clearly articulated and affirmatively expressed" state policy to displace competition, but found none, saying ". . . thus the authority cannot establish that there is a "clearly articulated and affirmatively expressed" sovereign state policy favoring the Authority's boycott of competitors in the parking market. . . ." 641 F.2d at 37. The First Circuit ruled that the Authority was not exempt from the application of federal antitrust laws and reinstated the complaint.

The Tenth Circuit and the First Circuit looked at similar statutes, but they came up with entirely different results. The First Circuit found no exemption. The Tenth Circuit found a broad, and possibly unlimited, exemption. Since there is a split in the circuits, it is appropriate for this Court to grant certiorari to the Tenth Circuit.

3. This Case Is Important To The Nation Because The Ruling Of The Tenth Circuit Grants Exemption From Antitrust Laws To All Municipal Corporations So Long As Those Corporations Act Within Their Granted Powers.

In *City of LaFayette v. Louisiana Light and Power, supra,* this Court expressed the concern over the economic effect of permitting local governments to pursue their own economic policies. After noting that there were 62, 437 different units of local government in this country according to a 1973 report of the Census Bureau, the plurality opinion stated:

> . . . If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy congress established. 345 U. S. at 408.

According to the Census Bureau, there are 266 incorporated cities and towns within Colorado. 1/ Under the ruling of the Tenth Circuit all of these are free to operate municipal airports in any manner they choose without regard to the anti-competitive effects. At municipal airports they are free to ignore federal antitrust laws. In the states under the immediate jurisdiction of the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) there are 1,867 incorporated cities and towns. 2/ Under the ruling of the Tenth Circuit all of the cities and towns are free to operate airports and impact interstate commerce without regard to the antitrust laws. Considering the importance of aviation in this country, both commercial and general, the Tenth Circuit has created a considerable chink in the "armor of antitrust protection" which the congress has established and this Court has upheld and protected. But the reasoning of the Tenth Circuit, and its holding, are not limited to airports. States generally grant municipalities broad authority to engage in various economic enterprises for the benefit of their citizens. Colorado, for example, specifically authorizes municipalities to acquire gas and electric power distribution systems (C. R. S. 1973 §31-15-

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1/ Preliminary report 1980 Census of Population and Housing, Colorado U. S. Department of Commerce, Bureau of the Census.

2/ *Ibid.*, for those respective states.

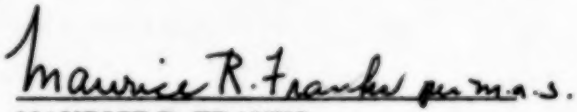
707) and to establish markets, slaughter houses, cold storage plants, public scales, and parking facilities (C. R. S. 1973 §31–15–711). Of course there are many other examples. It was such a general enabling statute under which the City of LaFayette, Louisiana operated its electric utility. Louisiana Revised Statutes 33:361. This honorable Court ruled that that statute on its face did not exempt the City of LaFayette from the federal antitrust laws. But under the ruling of the Tenth Circuit this is exactly the type of statute which would grant exemption.

If the decision of the Tenth Circuit is read in its narrow sense, a municipality would have to find some specific state authorization before it could claim exemption from the antitrust laws. But if the several district courts read the decision in its broad sense, then anytime any municipality within the Tenth Circuit operates in a governmental capacity it enjoys exemption from the antitrust laws. This is indeed a "considerable chink" in the armor of antitrust protection.

One hesitates to predict what the other circuits will do, faced with the split between the Tenth Circuit and the First Circuit. But if they follow the Tenth Circuit, and municipalities would exercise all the pressure on them they could to persuade them to do so, then the federal antitrust laws would, for practical purposes, cease to apply to municipalities in spite of the policies of the Congress and this honorable Court. To protect the national economic policy established by the Congress and promoted by this Court, this Court should grant certiorari to correct the obvious errors of the Tenth Circuit.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue herein to the United States Court of Appeals to the United States Tenth Circuit, and that the judgment and order of that court be reversed and the instant case be remanded for trial.



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APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
NO. 80-2083
Filed April 13, 1982

PUEBLO AIRCRAFT SERVICE, INC., a Colorado corporation,
Plaintiff-Appellant,

v.

THE CITY OF PUEBLO, COLORADO, a Municipal corporation, THOMAS LOPEZ, Individually and as Director of Aviation for the City of Pueblo, PAN-ARK AVIATION, INC., a Colorado corporation, and GEORGE RABATIN, JR.,
Defendants-Appellees.

filed April 13, 1982
Appeal From the United States District Court
For the District of Colorado
(D.C. No. 77-HC-1049)

Alan L. Sulzenfuss, Salida, Colorado (Maurice R. Franks, Pueblo, Colorado, with him on the brief), for Plaintiff-Appellant.
Thomas E. Jagger, Pueblo, Colorado (Joseph A. Vento of Kettelkamp, Vento & Brown, Pueblo, Colorado, with him on the briefs), for Defendants-Appellees.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judge

BARRETT, Circuit Judge.

This is an action involving alleged federal antitrust act violations brought by plaintiff-appellant, Pueblo Aircraft Services, Inc. (Pueblo Aircraft) under 15 U.S.C.A. §§ 1 [1] and 14 [2] against the City of Pueblo, Colorado (City), Thomas Lopez, City's Director of Aviation, Pan-Ark Aviation, Inc. and George Rabatin, Jr., arising from City's operation of a municipal airport.

The district court granted the defendants-appellees' motion for summary judgment, finding/concluding that City is immune from the federal antitrust laws and further that no genuine claim is stated against the other defendants-appellees. The trial court pertinently observed after finding/concluding that City is immune from federal antitrust laws, that if this conclusion is correct, no further consideration of the summary judgment motions is necessary "[s]ince all antitrust claims of the plaintiff against all the remaining defendants are based on

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1/ 15 U.S.C.A. §1 provides in pertinent part: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal."

2/ 15 U.S.C.A. §14 provides in pertinent part: "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption, or resale within the United States. . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods,wares merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

alleged violations by the City of the Federal antitrust laws. . ." [R., Vol. I, p. 182]. Thus, the district court dismissed the suit with prejudice as to all defendants on the ground that no claim had been stated upon which relief can be granted. The court granted summary judgment based upon extensive pleadings, voluminous depositions, documents, affidavits filed in support of and in opposition to the motions, briefs of the respective parties, and an open court hearing.

We approach this review aware that summary procedure should be used sparingly in antitrust litigation, *Poller v. Columbia Broadcasting*, 368 U.S. 464 (1962), and that summary judgment should issue only where there is no genuine issue of material fact. *Harman v. Diversified Medical Investments Corporation*, 488 F.2d 111 (10th Cir. 1973), *cert. denied*, 425 U.S. 951 (1979). Factual inferences tending to show triable issues of material fact should be viewed in the light most favorable to the existence of such issues in assessing a motion for summary judgment. *Harsha v. U.S.*, 590 F.2d 884 (10th Cir. 1979).

Facts

The facts stated most favorably to Pueblo Aircraft are as follows. In 1948 City acquired from the federal government by deed a tract of land which had been used as a military airfield during World War II, granted for the specific purpose of establishing a municipal airport. At the time of acquisition, there were certain facilities available to City on the premises for airport operations including hangars and a storage facility to store aviation fuel. Since prior to 1970, City granted leases to three "fixed base operators" who operated businesses upon specific portions of the airport lands so leased and performed specific services which were monitored by City, including refueling of aircraft, sale of new and used aircraft, repair and maintenance of aircraft,

sale of aircraft parts and supplies, rental and charter of aircraft, conduct of a flying school, operation of food vending machines, storage of aircraft, and the manufacture of aircraft parts and components. The lease agreements with each of the "fixed base operators" 3/ required them to purchase all aviation fuel from City for resale. 4/ The three fixed base operators were defendants Pan-Ark, Flower Aviation and the plaintiff-appellant, Pueblo Aircraft.

In 1970, Willard J. Teel and Betty I. Teel acquired all of the stock of Pueblo Aircraft and thereafter actively managed a fixed base operation under the lease granted by City, which expired on March 31, 1977, but was extended to June 31, 1977.

Several months prior to the expiration of Pueblo Aircraft's lease, City determined to require public bidding for the lease, upon its termination, of the premises and improvements leased to Pueblo Aircraft. The only bidders were Pueblo Aircraft and Pan-Ark. Pan-Ark was declared the successful bidder and City authorized a lease of the premises formerly occupied by Pueblo Aircraft to Pan-Ark commencing July 1, 1977.

At all times since the acquisition of the airport, City has

3/ A fixed base operation is one that requires the operator who enters into a lease agreement-contract with City to provide specific facilities, services, equipment and personnel to meet the requirements for certain operations of an airport used by aircraft, passengers, crews and freight shippers. In most cases, the leases included those portions of the airport premises with hangars and other improvements thereon where the services and supplies are performed and kept.

4/ The lease agreement proviso, as modified on August 2, 1974, reads: "Lessee agrees to purchase from the City all aviation gasoline or propellants dispensed through Lessee's operation at the City's cost, plus five and one-half cents (5-½ cent) per gallon. Lessee shall be billed monthly for all gasoline purchased during the month, and such bills shall be due and payable upon billing."

been a "home rule" city, chartered pursuant to Art. XX, Section 6 of the Colorado Constitution which permits City to exercise "the full right of self-government in both local and municipal matters" and provides that the charter or ordinances enacted by City pursuant to such authority shall supersede the statutes of Colorado in exercising self-government.

City, at all times following acquisition of the airport, assumed control and responsibility for providing and maintaining the storage facility, monitoring the quality of fuel, providing fire protection and assuring the supply of aviation fuel to serve the needs of the fixed base operators and other aircraft using the airport who were not supplied by the fixed base operators. All leases entered into between City and the fixed base operators required the operators-lessees to purchase all aviation gasoline or propellants dispensed by them from City. The storage facility was on the premises when the property was acquired by the City. It was an underground fuel storage facility located away from the buildings and ramp area, and City daily monitored the fuel in order to assure its quality before it was dispensed to the fixed base operators. The City purchased the fuel through competitive bidding. At no time did any fixed base operator offer to construct its own storage facility on the airport premises so as to obtain aviation fuel independent of City.

Trial Court's Ruling

The district court found/concluded that City is immune from the federal antitrust laws primarily by virtue of its status as a "home rule city" chartered pursuant to Article XX, Section 6 of the Colorado Constitution. The court relied on *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980) as authority for the proposition that City's operation and management of the airport was exempt from federal antitrust laws by virtue

of its power and authority as a "home rule" city. In *Community Communications Co. v. City of Boulder*, ____ U.S. ____, 50 U.S.L.W. 4144 (January 13, 1982) the Supreme Court reversed our decision reported in 630 F.2d 704, *supra*, and held that an ordinance enacted pursuant to Colorado's "home rule" authority does not constitute municipal action exempting it from antitrust scrutiny because it does not constitute municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy as enunciated in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Parker v. Brown*, 317 U.S. 341 (1943). The parties agree here that in light of *Community Communications Co. v. City of Boulder, supra*, the district court's reliance on the "home rule" status of City for exemption from antitrust scrutiny must fail.

However, the district court alternatively relied on a specific statutory authorization granted to City as a further ground for its immunity determination. The court found that the State of Colorado has specifically authorized City to acquire and operate a municipal airport and that such acquisition and operation "are hereby declared to be public, governmental functions, exercised for a public purpose and matters of public necessity" by virtue of C.R.S. 1973 §41–4–101 which provides:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other

> powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

The district court concluded, then, that City, in its dealings with the fixed base operators, "is immune from the Federal antitrust laws", and, because all antitrust claims of Pueblo Aircraft against all other defendants were necessarily based on alleged violations by City, the immunity of City required granting of summary judgment motions of dismissal with prejudice as to all defendants. However, in an abundance of caution, the trial court determined it desirable, should its ruling on City's immunity be reversed on appeal, to address all other questions raised by the summary judgment motions. The court thereupon, in detail, addressed and ruled upon each of Pueblo Aircraft's remaining antitrust claims and found/determined that each was without substance, and that there were no specific facts showing that there were any genuine issues for trial as to any claims against the remaining defendants. We agree. We rely upon the district court's detailed opinion and order of September 26, 1980, in affirming the district court's grant of summary judgment to the remaining defendants.

Our Disposition

The sole issue we shall discuss on appeal is whether the

district court erred in finding/concluding that City is immune from the federal antitrust laws in its dealing with the fixed base operators in the operation of the municipal airport.

In *Community Communications Co. v. City of Boulder, supra,* the Supreme Court made it clear that a municipality is not exempt from the antitrust laws unless it constitutes the action of the state itself or was municipal action in furtherance or implementation of state policy by means of a "clear articulation and affirmative expression" contemplating a municipality's anticompetitive program. The Court stated, *inter alia:*

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker,* or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette, Orrin W. Fox Co.,* and *Midcal.* . .
>
> • • •
>
> . . . When *Parker* examined Congress' intentions in enacting the antitrust laws, the opinion noted that "nothing in the language of the Sherman Act or in its history. . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature.* . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." 317

U.S., at 350-351 (emphasis added). . . .

* * *

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.
>
> 50 U.S.L.W. pp. 4146, 4147.

In keeping with the commands of *Community Communications Co. v. Boulder, supra,* the key inquiry, we believe, is whether the State of Colorado by affirmative legislative action granted City an exemption from operation of federal antitrust laws by virtue of the statutory language contained in C. R. S. 1973, §41–4–101, *supra.* We hold that it does. We affirm the district court.

In *Lafayette v. Louisiana Power & Light Co., supra,* the Supreme Court held that in order to find that a subordinate state governmental body is exempt from the operation of federal antitrust laws it must be found that the state legislature contemplated certain type of anticompetitive restraint

in authorizing the subordinate body to perform and engage in certain activity and, pertinently, that it is not necessary to point to express statutory mandate for each act that is alleged to violate the antitrust laws, and that it will suffice if the activity in issue is found to be clearly within legislative intent.

In E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966), suit was brought under the federal antitrust laws against the Port Authority and a fixed base operator at Boston's Logan Airport, alleging an antitrust conspiracy in forcing the plaintiff, who previously held a fixed base operator's lease at the airport which the Authority had refused to renew, to sell its business and equipment at the airport to the new fixed base operator at a minimal figure. The plaintiff sought damages pursuant to the Sherman Act from the Port Authority and the new fixed base operator. In affirming the district court's judgment dismissing the complaint, the court said, *inter alia:*

> By statute it [the Port Authority] has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. . . As stated by the Massachusetts Supreme Judicial Court in Opinion of the Justices, 334 Mass. 721, 731, 136 N.E.2d 223 (1956), the Authority "is in no sense a private or business corporation * * It has no stockholders. No person can derive a profit through its operations. Only the public is to be benefited * * "
>
> It is described in the act creating it as "a body politic and corporate" which expression

the Court said "is appropriate to a corporation to which is entrusted some of the powers of the State for public purposes". . . The court also characterized the Authority "as a purely public corporation for public purposes - - an arm of the State - - analogous to a municipal corporation." Logan Airport is and always has been a public project.

In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with Butler-Boston. *It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport. . . . Plaintiff's contention that the Authority in operating Logan Airport is engaged in a purely proprietary capacity and is conducting a private business has no merit. Nor does the arrangement with Butler-Boston violate the Sherman Act. What was done here was in the exercise of a valid governmental functions. The anti-trust laws are aimed at private action, not at governmental action.* As stated by the Supreme Court in *Parker v. Brown* . . . "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature * * * The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state * * *."

362 F.2d at pp. 55, 56. [Emphasis supplied]. [Footnotes omitted].

In *Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361 (10th Cir. 1972), we pointed out that *Parker v. Brown, supra*, involved a California statute which authorized the establishing, through action of state officials, of programs for marketing of agricultural commodities produced in the state in such a way as to restrict competition among the growers and to maintain prices in the distribution of their commodities to packers. This act authorized the formation of marketing combinations comprised of a number of producers within a particular district. Our court emphasized that, although the combination involved private individuals, it was unquestionably formed under authority of state law and for the purpose of advancing a state economic program, and consequently. . . "it was indeed state action" 456 F.2d at p. 1366.

Semke recognized . the "state action" exemption under facts and circumstances encompassing private or individual "proprietary" gains deemed to be important in the advancement of a state's economic program. It seems that the recognition of exemption from the antitrust laws under such circumstances mandates recognition of the exemption to City in the case at bar.

In *Rocky Mountain Motor Co. v. Airport Transit Co.*, 235 P.2d 580 (Colo. 1951), the Court held that the City of Denver, in establishing its municipal airport by virtue of a special 1929 ordinance whereby the operation of the airport was assigned to the city's Department of Improvements and Parks was acting in a proprietary rather than a governmental capacity. Significantly, however, the Colorado Supreme Court pointed out that it was not until 1945 that the Colorado legislature enacted legislation declaring the operation of publicly owned airport facilities to be a govern-

mental function. Having done so, the court referred to those airports being operated under authority of the statute as those operated as a ". . . governmental function assigned to it to enforce the general policy of the state in the administration of general laws." 238 P.2d at P. 586.

In *Duff v. City and County of Denver*, 362 P.2d 1049 (Colo. 1961), the Court held that a state statute authorizing the condemnation of private lands by eminent domain proceedings by counties, cities and towns was in recognition of the public necessity and public purpose ". . . for the installation of necessary Airport facilities, such as service roads, aircraft taxiways, airplane parking appurtenances, airplane hangars, airplane shopping facilities, and other similar appurtenances to the Airfield." 362 P.2d at P. 1050.

In its "governmental capacity" a municipality acts as an arm of the state for the public good on behalf of the state rather than itself. *See: Schwalb v. Connely*, 179 P.2d 667 (Colo. 1947) (recognizing immunity of city from liability in operation of general hospital it owned and operated by virtue of power delegated to it by state for welfare and protection of inhabitants); *Kirksey v. City of Fort Smith*, 300 S.W.2d 257 (Ark. 1957) (airport operation and maintenance under state statute declaring such operation to be a governmental function).

Those courts which have held the ownership, maintenance and operation of a municipal airport to be a "proprietary function" instead of a "governmental function" have generally done so in the absence of a statute such as C.R.S. 1973, §41–4–101, *supra*, and have found that the municipality acts mainly for its own ends, purposes and benefits, separable from and in addition to any burdens and benefits imposed or conferred by the state government. In the absence of an express statutory direction, such as that contained in C.R.S. 1973, §41–4–101, *supra*, the operation of a

municipal airport is generally regarded as a proprietary function rather than a governmental function. *See* 56 Am. Jur. 2d, §§199, *et seq*, 66 A.L.R.2d 634; 25 A.L.R.2d 1048; 141 A.L.R. 1440.

The primary duty of the courts is to seek out and ascertain the legislative intent. Where the language of the statute is clear, plain and unambiguous, the duty of interpretation does not arise and rules designed to aid doubtful meanings do not come into play. Here, the Colorado legislature, by virtue of C.R.S. 1973, §41–4–101, *supra*, has expressly declared the operation of the airport facilities" . . . to be public governmental functions, exercised for a public purpose, and matters of public necessity. . . ." In *Hannon v. City of Waterbury*, 136 A. 876 (Conn. 1927) the court identified two distinct categories of governmental functions of a municipality - - one, those duties imposed or authorized by the state for "the benefit of the general public" and the other, those duties which are "for the particular advantage of the inhabitants of the municipality, and only . . . indirectly for the benefit of the people at large." *See also: Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898). Clearly, City's airport is one operated for the benefit of the general public and not for particular advantage of the inhabitants of the City of Pueblo. This is best evidenced by the following allegation contained in Pueblo Aircraft's complaint:

> 6. PUEBLO MEMORIAL AIRPORT is a major airport located on major crosscountry interstate air routes and is utilized by local and interstate private aircraft and passengers, local and interstate commercial aircraft and passengers, and by United States military aircraft and personnel. PUEBLO MEMORIAL AIRPORT is the largest facility for refueling aircraft along the route of V-244 between Salina, Kansas and San Francisco, California.

V-244 is a major air route connecting San Francisco with the Eastern United States.

[R., Vol. I, pp. 1, 2].

WE AFFIRM.

APPENDIX B

DENIAL OF REHEARING

MAY TERM - May 28, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

PUEBLO AIRCRAFT SERVICE, INC., a Colorado corporation,

Plaintiff-Appellee,

vs.

THE CITY OF PUEBLO, COLORADO, a municipal corporation, THOMAS LOPEZ, individually and as Director of Aviation for the City of Pueblo, PAN-ARK AVIATION, INC., a Colorado corporation, and GEORGE RABATIN, JR.

Defendants-Appellees

No. 80-2083

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no

member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 77–HC–1049

PUEBLO AIRCRAFT SERVICE, INC.,
a Colorado corporation,

Plaintiff,

vs.

THE CITY OF PUEBLO, COLORADO,
a Municipal corporation,
THOMAS LOPEZ, individually and
as Director of Aviation for
The City of Pueblo, PAN-ARK
AVIATION, INC., a Colorado
corporation, GEORGE RABATIN, JR.,

Defendants.

Filed September 26, 1980

Mr. Alan J. Sulzenfuss, Attorney at Law. P. O. Box 1003, 222 "E" Street, Salida, Colorado 81201, for Plaintiffs, and Mr. Maurice Franks, Attorney at Law, Airport Executive Center, 444 Keeler Parkway, Pueblo, Colorado 81001, for Plaintiffs.

Mr. David A. Cole, Assistant City Attorney, and Mr. Thomas E. Jagger, Attorney at Law, 127 First National Bank Building, Pueblo, Colorado 81003, for Defendants, City of Pueblo and Thomas Lopez.

Kettelkamp and Vento, Attorneys at Law, 540 United

Bank Building, Pueblo, Colorado 81003, for Defendants, Pan Ark Aviation, Inc., and George Rabatin, Jr.

OPINION AND ORDER

CHILSON, Judge

Preliminary Statement

This action arises out of the operation of a municipal airport by the City of Pueblo.

Since prior to the year 1970, various services, such as the refueling of aircraft, repair of aircraft, etc., were performed at the airport by three "fixed base operators" operating under leases from the City.

The three fixed base operators were the defendants, Pan Ark, Flower Aviation, and the plaintiff, Pueblo Aircraft Service, Inc.

In 1970, Willard J. Teel and Betty I. Teel acquired all of the stock of the plaintiff and thereafter managed and operated the business carried on under the lease to the plaintiff.

Plaintiff's lease expired by its terms on March 31, 1977, and was extended to June 31, 1977.

Several months prior to the expiration of plaintiff's lease, the City determined to require public bidding for a lease of the premises then leased to plaintiff. Plaintiff and Pan Ark were the only bidders. Pan Ark was declared to be the successful bidder and the City Council authorized the lease of said premises to Pan Ark on June 21, 1977, to commence on July 1, 1977.

Thereupon, plaintiff commenced this action seeking to

recover damages based on certain claims under state law and other claims based on alleged violations of the Federal Antitrust laws.

The state claims were dismissed by the Court leaving for determination only the antitrust claims of the plaintiff and the defendants' claim that the City is immune from the Federal Antitrust laws.

Plaintiff's claims are designated in the pre-trial order as the plaintiff's First, Second, Fourth Claim (A), Fourth Claim (B), and Fifth Claim.

After the pre-trial order was entered, the claims against Flower Aviation were dismissed upon joint motion of Flower Aviation and the plaintiff.

Thereafter, the remaining defendants, City of Pueblo, Lopez, Pan Ark, and George Rabatin, Jr., filed motions for summary judgment of dismissal of the claims against them which motions are now before the Court for determination.

Briefs in support of an in opposition to the motions were filed supported by various affidavits, documents, and voluminous depositions. A hearing on the motions was had in open court on September 9, 1980.

The Court has read and considered the motions and the documentary evidence filed in support of and in opposition to the motions and has considered the oral argument of counsel.

By the pleadings and the summary judgment motions, defendants contend the City of Pueblo is immune from the Federal Antitrust laws. We address this question first.

IMMUNITY

The pertinent uncontroverted facts are that the City in 1948 acquired from the Federal Government a tract of land which the Government had used as a military airfield during World War II. The City acquired the property for the specific purpose of establishing a municipal airport.

At the time of its acquisition, certain facilities for airport operations existed on the premises, including, among other things, hangars and a storage facility to store aviation fuel.

The deed from the Government to the City contained a provision that no exclusive right for the use of the airport shall be vested in any person to the exclusion of others in the same class including:

> "Any exclusive right to engage in the sale or supplying of aircraft, aircraft accessories, equipment, or supplies (excluding the sale of gasoline and oil), or aircraft services necessary for the operation of aircraft (including the maintenance and repair of aircraft, aircraft engines, propellers, and appliances.)" (Affidavit of Fred E. Weisbrod, Exhibit No. 1)

In 1945, the State Legislature enacted a statute providing in pertinent part:

> "Section 1. The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air

navigation facilities, and the exercise of any other powers herein granted to any county, city and county, city or town, are hereby declared to be public, governmental functions, exercised for a public purpose, and matters of public necessity, and such lands and other property, easements and privileges acquired and used in the manner and for the purposes enumerated in this act shall and are hereby declared to be acquired and used for public purposes and as a matter of public necessity." (1945 Session Laws, p. 38.)

Prior to, and at all times since the acquisition of the airport, the City of Pueblo was a "Home Rule" City, chartered pursuant to Article XX, Section 6 of the Colorado Constitution, which provides in pertinent parts:

"Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town are hereby vested with and they shall always have power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith. - - -

"It is the intention of this article to grant

> and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

After acquisition of the airport, the City elected to provide certain necessary and essential services and supplies by leasing portions of the airport and the hangars and other improvements located thereon to fixed base operators who would provide those supplies and services to those using the airport. Specifically the leases provided:

> "D. The City hereby grants unto the Lessee the following rights and privileges subject to the Rules and Regulations governing the Pueblo Memorial Airport set forth by the City, the State of Colorado, or the Federal Aviation Agency:

1. To sell new and used aircraft.
2. To conduct a school for the purpose of teaching others to fly.
3. To rent aircraft to others.
4. To charter aircraft.
5. To rent automobiles belonging to responsible automobile renting companies; i. e., Hertz, Avis, National.

6. To sell in the demised premises, soft drinks, candy and tobacco from coin operated vending machines but not food or food products.
7. To dispense aviation and automobile gasoline and lubricants or propellants in accordance to (sic) the rules and regulations of the City, and the Federal Aviation Agency, except that Lessee may not operate a public automotive service station nor dispense automobile gasoline, lubricants or propellants to the public. Said automotive operation is restricted to the Lessee's equipment and the servicing of rental autos.
8. To use, in common with others authorized to do so, common areas of the Airport, including runways, taxiways, aprons, and other conveniences provided for public use for the take-off, flying, and landing of aircraft.
9. In or upon said demised premises, to locate, maintain and operate shops for limited or full repair, maintenance and/or overhaul of aircraft, or aircraft components including the storage and sale of aircraft parts, accessories and airmen's supplies, materials and equipment.
10. To store aircraft for others, either in a main hangars, tee hangars or tie down area.
11. To manufacture aircraft or allied parts and components."

Leases were issued to three fixed base operators, namely, the plaintiff, Pan Ark Aviation, and Flower Aviation. All three leases authorized the lessees to engage in all of the activities set forth above.

Since there was only one fuel storage facility to store fuel on the airport to supply the customers of the fixed base operators, each lease contained the following provision:

> "The lessee agrees to purchase from the City all aviation gasoline or propellants dispensed through lessee's operation at the City's cost plus five cents per gallon."

This was modified in 1974 to increase the charge from five cents to five and one-half cents per gallon.

The City assumed the responsibility for providing and maintaining the storage facility, monitoring the quality of fuel, providing fire protection and delivering to and maintaining in the storage facility the fuel supplies to serve the needs of the fixed base operators and certain other aircraft using the airport who were not supplied by the fixed base operators.

Assuming but not deciding that the City's dealings with the fixed base operators violated the Federal Antitrust laws in one or more ways alleged in the complaint, we now address the legal question of the City's immunity from the Federal Antitrust laws in the light of the foregoing uncontroverted facts.

CASE LAW ON IMMUNITY

The *Parker* Doctrine which is the basis for immunization of state action from the Federal Antitrust laws was established by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). The doctrine has been the subject of interpretation in many later decisions of the federal courts, including the United States Supreme Court.

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., et al, ____ U.S. ____, (48 U.S.L.W. 4238) (March 3, 1980) hereinafter referred to as *"Midcal"*, is the most recent decision of the Supreme Court dealing with the

Parker Doctrine. In that decision, the Court set forth two requirements for state immunity;

1. That the state action be clearly articulated and affirmatively expressed as state policy; and,

2. That the policy be actively supervised by the state itself.

However, in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978) the City was held not immune from an antitrust action arising from the operation of a municipally owned and operated electric power utility. In *Lafayette*, the plurality opinion recognized that in certain circumstances a municipality may be immune from antitrust violations. The opinion states:

> "While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Lafayette* (supra) at page 415.

The Tenth Circuit Court of Appeals in *Community Communications Company, Inc., v. City of Boulder*, ____ F.2d ____ (Case No. 80-1348) decided May 28, 1980, held the City of Boulder (a Home Rule City) immune from the Federal Antitrust laws.

In that case, the plaintiff's complaint was directed to a city ordinance placing a moratorium on expansion of plaintiff's cable T. V. business and to the action of the city in soliciting others in the cable T. V. business to engage in that business in the City under a proposed model ordinance. Plaintiff claimed these actions were in violation of the Federal Antitrust laws.

In holding the city immune under the *Parker* Doctrine, the opinion reviewed both the *Lafayette* and *Midcal* cases.

The Tenth Circuit concluded the two tests set forth in *Midcal* had been met.

With reference to the *Lafayette* case, the Tenth Circuit opinion states:

> "The decision, considering the separate opinions, was grounded on the fact that the action was not directed or authorized by the state pursuant to state policy to displace competition with regulation or monopoly public service." (P. 9 slip opinion.)

The Tenth Circuit opinion cites the pertinent provisions of Article XX, Section 6 of the Colorado Constitution which we have set forth above and then states:

> "The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power. *See* the references in City and County of Denver v. Henry, 38 P.2d 895 (Colo.), to the situations where an ordinance may even supersede a state statute as to matters of purely local concern. *See also* Service Oil Co. v. Rhodus, 500 P.2d 807 (Colo.), and

> Davis v. City and County of Denver, 342 P. 2d 674 (Colo.). In any event, we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City.
>
> "The Colorado Supreme Court has considered the scope of the Colorado version of home rule in several other cases including Veterans of For. Wars, Etc. v. Steamboat Springs, 575 P. 2d 835 (Colo.), Security Life and Accident Co. v. Temple, 492 P. 2d 63 (Colo.), and Four-County Met. C. I. Dist. v. Board of County Com'rs., 369 P.2d 67 (Colo.). In the *Four County Metro* case the court stated that the home rule cities in Colorado as to local matters had the complete authority."

In other words, municipal policy exercised by a Home Rule City in Colorado is the equivalent of "state action" when exercised in connection with municipal affairs.

In view of the fact that the state of Colorado has specifically authorized a city to acquire and operate a municipal airport and that such acquisition and operation "are hereby declared to be public, governmental functions, exercised for a public purpose and matters of public necessity - - -", complete sovereignity has been granted by the Constitution to Home Rule Cities and the Court is satisfied that the City of Pueblo in its dealings with plaintiff and the other fixed base operators was acting in a governmental and not in a proprietary capacity.

The Pueblo Airport is located outside the territorial limits of the City of Pueblo. The plaintiff contends:

> "Since the airport is outside the corporate limits, when Pueblo operates the airport it is not exercising home rule authority."

This contention is without merit.

In 1931, the legislature authorized cities

> "to acquire, establish, construct, own, control, lease, accept, improve, maintain, operate, and regulate airports and landing fields for the use of airplanes and other aircraft either within or without such municipalities - - -." 1931 S. L. p. 788; C.R.S. 1973, §41–4–201.

In 1945, the state legislature in authorizing municipal and county airports stated:

> "All of the powers, rights and authority granted to counties by this act and to cities and towns by any other law may be exercised and enjoyed by such counties, cities and counties, cities and towns, acting jointly, either within or without the territorial limits thereof, without regard to the distance said airport may be located from the boundary of any such city or town." 1945 S. L. p. 39.

Article XX, Section 6 provides in pertinent part:

> "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded

> by the charters of such cities and towns or by ordinances passed pursuant to such charters."

Thereby the powers granted to a municipality which is chartered under the provisions of Article XX of the state constitution and not superseded by the charter of the Home Rule City are incorporated as a part of the powers which are granted by the constitution to a Home Rule City.

Pueblo's latest Charter adopted in 1954 provides in Section 1–3:

> "By the name of Pueblo, the City shall have perpetual succession and shall have all the powers granted to municipal corporations and to cities by the Constitution and general laws of this State together with all the implied powers granted."

The Court cannot concur with the conclusion of the plaintiff that the City of Pueblo in operating its airport outside the corporate limits of the City of Pueblo was not exercising Home Rule authority.

We conclude that the City of Pueblo in its dealings with the fixed base operators is immune from the Federal Antitrust laws. Since all antitrust claims of the plaintiff against all the remaining defendants are based on alleged violations by the City of the Federal Antitrust laws, the immunity of the City requires the granting of the defendant's motions for summary judgment of dismissal and the dismissal of this action with prejudice as to all defendants.

If the Court's ruling on the immunity question is correct, no further consideration of the summary judgment motions is necessary.

If, however, the Court's ruling on immunity should be reversed on appeal, the other questions raised by the motions for summary judgment will remain undetermined by the appellate court.

Therefore, the Court believes it highly desirable that it rule on all questions raised by the summary judgment motions in order that upon appeal, the appellate court can review the Court's ruling on all questions raised by the summary judgment motions if this Court's ruling on the question of immunity should not be affirmed.

By so doing, if this action is remanded for trial, the trial court and the parties can proceed with the trial in the light of the appellate court's affirmance or reversal of each of the trial court's rulings on each of the plaintiff's antitrust claims.

We therefore consider and determine the motions for summary judgment separately as to each of the plaintiff's antitrust claims.

PLAINTIFF'S ANTITRUST CLAIMS

Rule 56(e) of the Federal Rules of Civil Procedure governs the Court's consideration of the motions for summary judgment.

It provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served

> therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In considering the motions for summary judgment, the Court is well aware of the general rule established by the United States Supreme Court that "summary procedures should be used sparingly in complex antitrust litigation - - -." *Poller v. Columbia Broadcasting System, Inc., et al.*, 368 U.S. 464, 473 (1962).

We do not believe that this rule relieves the plaintiff of its obligation under Rule 56(e) to "set forth specific facts showing that there is a genuine issue for trial."

Nor do we believe that the Supreme Court rule relieves the trial court of its duty to review and consider the materials filed by the parties in support of and in opposition to the defendants' motions for summary judgment, to determine whether or not such material reveals specific facts showing that there is a genuine issue for trial.

The material submitted by the parties is quite voluminous, consisting of affidavits, six depositions containing over 650 pages of testimony, letters, proceedings of the City Council and other documents before the Court.

The Court has reviewed and considered this material as

well as the briefs and the oral arguments of council and makes the following determinations.

FIRST AND SECOND CLAIMS

These claims seek relief from the City and Lopez, the Director of the Airport.

The claims are based on the provision contained in the plaintiff's lease requiring the plaintiff to purchase from the City, at the City's cost plus five cents per gallon, all aviation gasoline or propellants dispensed by plaintiff through its operation.

There is no issue of material fact. Admittedly, the leases under which the plaintiff operated from 1970 to June 31, 1977, provided that the lessee was required to purchase all aviation gasoline or propellants from the City.

The reasons for the inclusion of this clause in the leases of the fixed base operators are not in dispute.

In 1948, the airport property was acquired from the Federal Government for the purpose of establishing and operating a public airport. The City then leased portions of the property to certain fixed base operators for the non-exclusive right to sell new and used aircraft; to conduct a school for the purpose of teaching flying; rental of aircraft to others; to charter aircraft; to dispense aviation and automobile gasoline and lubricants or propellants; to operate shops for repair, maintenance, and overhaul of aircraft; to store aircraft; and to manufacture aircraft or aircraft parts or components.

At the time the City acquired the airport, there existed an underground fuel storage facility which the City repaired, maintained and modified and continued to use as the air-

port's only fuel storage facility. It was located away from the terminal buildings and ramp area.

The City on a daily basis, monitored the fuel in order to control and assure its quality before it was dispensed by the fixed base operators.

The City purchased the fuel through competitive bidding. The supplier delivered the fuel to the storage facilities at the airport where it was dispensed to the customers of the fixed base operators and other users.

There is no evidence that the plaintiff or the other fixed base operators during the period of time here involved offered to build their own storage facilities at an appropriate place on the airport and thereby to obtain and store a supply of fuel from sources other than the City.

Upon the basis of these undisputed facts, the Court concludes that the exclusive dealing clauses in the plaintiff's leases did not violate either 15 U.S.C. §14 or 15 U.S.C. §1 and that the City's motion for summary judgment of dismissal of the first and second claims for relief should be granted.

With respect to the defendant, Lopez, it is undisputed that he did not assume the position of director of the airport until the year 1976 and the plaintiff has submitted no evidence, documentary or otherwise, that Lopez participated in any manner in the City's decision to include the exclusive dealing provisions in the plaintiff's lease or the leases of the other fixed base operators.

The plaintiff's lease was entered into in 1967 and plaintiff acquired it in 1970. The lease was extended in 1972 for an additional five years under an option contained in the original lease.

Assuming that the exclusive dealing clause was violative of the antitrust laws or any portion thereof, there is no factual or legal basis upon which Lopez could or can be held personally liable therefor.

The Court concludes that the motion of Lopez for summary judgment of dismissal of the plaintiff's first and second claims should be granted.

FOURTH CLAIMS A AND B

The Fourth Claim A of the original complaint states in pertinent parts:

> "Between January of 1974 and June of 1977, the following major services were available to aircraft customers at the Pueblo Memorial Airport on a competing basis: Plaintiffs and Flower Aviation, Inc., competed in fueling and lubrication; Plaintiffs and Pan Ark Aviation, Inc., competed in the maintenance and repair of aircraft and Plaintiffs and Pan Ark Aviation, Inc., competed in giving student flying instructions.
>
> "That on or about January of 1974, the Defendants and each of them, did conspire with each other, to eliminate Plaintiffs as a competitor in the foregoing major services provided at the Pueblo Memorial Airport.
>
> "That the Defendants did take the following overt actions in furtherance of the conspiracy referred to above:
>
> "a. In February of 1974 The CITY OF PUEBLO refused to deliver

Plaintiffs' aviation fuel which Plaintiffs by Lease was (sic) prohibited from purchasing from another party but nevertheless delivered to FLOWER AVIATION, INC. all fuel which FLOWER AVIATION, INC. desired;

"b. In the latter part of 1974 The CITY OF PUEBLO constructed a new building for FLOWER AVIATION, INC. which it rented to FLOWER AVIATION, INC. at a rental far below the market value for said building and far below the cost of amortizing said building over any reasonable period.

"c. In 1976 aircraft hangars rented by Plaintiffs and FLOWER AVIATION, INC. were damaged by a windstorm. The CITY OF PUEBLO repaired the hangar rented by FLOWER AVIATION, INC. but has failed and refused to repair the hangar rented by the Plaintiffs.

"d. In April of 1977 plaintiffs' lease expired on the land it leased and from which it operated its business at the PUEBLO MEMORIAL AIRPORT. The CITY OF PUEBLO placed said Lease up for bids. The Leases of FLOWER AVIATION, INC. and PAN-ARK AVIATION, INC., being longer than Plaintiffs' Lease, had not expired at that time and were not due to expire for (10)

years hence. The conditions of said bid were such that Defendant PAN-ARK AVIATION, INC. was able to outbid the Plaintiffs for the land formerly occupied by the Plaintiffs.

The Court refers to this claim as Fourth Claim A or the 1974 conspiracy.

By amendment to the complaint, the plaintiff alleges:

"That between October 1976 and January 1977, George Rabatin Jr., representing and acting on behalf of Pan-Ark Aviation Inc., and Thomas Lopez, representing and acting on behalf of the City of Pueblo, did meet together and did conspire to place the premises occupied by Plaintiffs at Pueblo Memorial Airport up for bid and to impose such conditions upon that bid that the Defendant, Pan-Ark Aviation Inc. would be successful in obtaining said bid for the following purposes: to eliminate Plaintiffs as a competitor at Pueblo Memorial Airport; to permit Pan-Ark Aviation Inc. to expand into the lease occupied by Plaintiffs; and to permit Pan-Ark Aviation Inc. to use Plaintiff's fuel allocation at Pueblo Memorial Airport."

For convenience, the Court refers to this claim as Fourth Claim B of the 1976 conspiracy.

FOURTH CLAIM A

This claim seeks relief from all defendants.

The Court's review of the material submitted in support of and in opposition to the motions for summary judgment reveals no facts which directly or by inference support the plaintiff's allegation that the defendants entered into a conspiracy to eliminate plaintiff as a competitor in the major services provided at the airport by fixed base operators or support the allegation that the overt acts set forth in the complaint were done in pursuance of such a conspiracy.

The uncontroverted facts revealed by the material are as follows:

All three fixed base operators were authorized by their respective leases to engage in all of the same activities including fueling and lubrication, maintenance and repair of aircraft and giving student flying instructions.

Both Mr. and Mrs. Teel state in their depositions that they know of no agreement or other acts constituting the alleged 1974 conspiracy. (Willard Teel Deposition, pp. 148–151 and Betty Teel's Deposition, p. 31). As to the allegations of overt acts by the City as alleged in paragraphs 5 (a), (b), and (c), the following uncontroverted facts appear from the materials filed in connection with the summary judgment motions.

As to the allegations in (a), in February 1974, the sale of aviation fuel was restricted by the Federal Government and the City received a limited allocation. The City in turn allocated available supplies to the fixed base operators on the basis of the amount of previous purchases. (Deposition of Mrs. Teel, p. 44.)

As to the allegations in (b), the materials reveal the original buildings occupied by Flower Aviation were old and in poor condition and the City desired to replace them. In 1974, Flower proposed to the City that it would build an

addition to the existing terminal building to be used by Flower in place of the old buildings it occupied. This proposal was not completed because Flower could not finance the construction of the new building. The City then agreed to build the new building and lease it to Flower and the present buildings would be demolished by the City. (Weisbrod Deposition pp. 15–18). The new building was constructed and the City entered into a lease with Flower for twenty years with an option to renew the lease for an additional ten years at a rental which the City determined would recapture the cost of the new building.

With respect to paragraph (c), the uncontroverted evidence is that in 1976, considerable wind storm damage to the buildings occupied by the fixed base operators occurred. Flower's buildings were relatively new and were repaired. The buildings occupied by the plaintiff were so old and deteriorated that major repairs were not justified. Plaintiff in May 1974, in a letter to City Manager Weisbrod, stated "- - - I would like to point out the hangar is probably beyond economical repair." (Exhibit 7 attached to City's motion for summary judgment.)

Upon the foregoing uncontroverted facts, and the failure of plaintiff to set forth any specific facts showing that there is a genuine issue for trial of its Fourth Claim A, the Court concludes the defendants' motion for summary judgment of dismissal of Fourth Claim A should be granted.

FOURTH CLAIM B

The amendment to the complaint alleges that between October 1976 and January 1977, George Rabatin, Jr., acting on behalf of Pan Ark, and Lopez, acting on behalf of the City of Pueblo,

> "did meet together and did conspire to place

> the premises occupied by plaintiff - - - up for bid and to impose such conditions upon that bid that defendants, Pan Ark - - - would be successful in obtaining said bid - - -"

and thereby eliminate plaintiff as a competitor and permit Pan Ark to expand on to the lease occupied by plaintiffs and to use plaintiff's fuel allocation.

In order to accomplish the purposes alleged above, there must first have been a conspiracy between Pan Ark and the City, first to get the City to put the plaintiff's leased property up for public bid and secondly, to get the City to include in the bid the requirement that the successful bidder provide a new building to replace hangar No. 4.

The plaintiff has offered no specific facts to support these alleged conspiracies.

The uncontroverted facts before the Court are that on February 4, 1975, a year before Lopez became director of the airport, the Department of Transportation, through the Federal Aviation Agency, notified the City as a follow up to a compliance review pursuant to Title VI of the Civil Rights Act of 1964:

> "Although the leases contain renewable provisions, I recommend that you continue to notify OMBE and the minority business community in Pueblo of opportunities available as airport concessionaires, and that bids be solicited from qualified minority firms and awards made without regard to race, color or national origin."

In 1976, Rabatin, Jr., became a stockholder and general manager of Pan Ark. Pan Ark's leasehold adjoined that of

the plaintiff. Pan Ark decided that it needed additional hangar space. Rabatin, Jr., and Charles Hedrick, stockholders of Pan Ark, talked to Lopez about their needs and their plans to provide an additional hangar on Pan Ark's then existing leasehold. Both Rabatin and Hedrick met with Lopez, discussed their plans, and asked that Pan Ark's leasehold be surveyed so they could plan for the construction of a new hangar on their leasehold. The survey was made and Rabatin, Jr., contacted some companies engaged in constructing hangars.

There is no evidence of any discussions between Lopez and Rabatin, Jr., about the subject of putting the plaintiff's leasehold up for bid when plaintiff's lease expired or what the terms of the bid proposal by the City would contain. On March 14, 1977, the City Council adopted Resolution No. 3932 stating that the City is committed to compliance with Title VI of the Civil Rights Act and stating:

> The leasing and/or granting of licenses to persons, firms or corporations for the use of available airport facilities be made by solicitation of bids including notification to the Colorado Economic Development Association , an affiliate office of the Office of Minority Business Enterprise, as well as the minority business community of Pueblo, and the award of such leases and/or licenses be granted without regard to race, color, religion, sex or national origin."

On April 5, 1977, at an informal meeting of the City Council which was attended by Mr. Teel representing the plaintiff and Mr. Rabatin, representing Pan Ark, Mr. Weisbrod, the City Manager.

> "noted that Pueblo Aricraft Service lease is expiring and a 90-day extension was given so

everyone can comply and it will be going for bids on May 15 for the granting of a new lease, or proposal for that fixed base operation."

The fixed base operation referred to was that being conducted by the plaintiff.

Also at this meeting, proposed minimum standard requirements for leases and concessions at the airport were discussed.

The City Manager, Mr. Weisbrod, said it would be in the best interest of the City to demolish hangar No. 4 located on plaintiff's leasehold.

On May 17, 1977, proposed minimum standards were discussed at a meeting of the City Council and later adopted. The minimum standards required lessees to lease or construct adequate buildings to carry on the activities of the lessee.

The minimum standards so adopted were furnished to prospective bidders together with the City's proposed "Operating Agreement and Land Lease." The "Proposed Operating Agreement and Land Lease" in Paragraph 2.32 provided:

> "The City of Pueblo will demolish the existing hangar located on Parcel 1 (Exhibit "A") within sixty days of the date hereof so that the Lessee may construct or lease a building of at least 11,000 square feet total useable space. An office, pilot's lounge, rest rooms, and student's class room will be required (approximately 3,000 square feet). A maintenance shop and aircraft hangar space should accomodate at least five aircraft. A minimum of 2400 square feet is required for a main-

tenance shop."

There were two bids submitted, one by the plaintiff, and one by Pan Ark. Plaintiff, in its bid, attached the following:

> "Pueblo Aircraft, Inc., must exclude the following paragraphs from the lease proposal for the following reasons:
>
> "Paragraph 2.32 - Demolishing the existing hangar located on parcel one and requiring an 11,000 square foot building imposes an impossible financial requirement. Pueblo Aircraft Service, Inc., will make a determined effort to solve the building problem and erect an adequate facility as soon as possible."

Pan Ark's bid contained no such exclusions. Pan Ark's bid was accepted by the City as being the best and highest bid and the lease between the City and Pan Ark was executed.

The plaintiff has failed by affidavit or otherwise to offer any specific facts supporting its allegation that the actions of the City Council in placing plaintiff's leasehold up for bid or including in the bid proposal that the successful bidder would be required to provide a new hangar on the leasehold and hangar No. 4 would be demolished by the City, were the result of a conspiracy between Lopez and Rabatin, Jr.

Having failed to set forth specific facts supporting the alleged conspiracy, the Court is of the opinion that defendants' motion for summary judgment of dismissal of the Fourth Claim B should be granted.

FIFTH CLAIM

By this claim, the plaintiff alleges:

A. The City refused to renew plaintiff's lease.
B. The bid proposal required the successful bidder to construct a new hangar to replace hangar No. 4.
C. That because Pan Ark already had a building on its leasehold, it was able to outbid the plaintiff.
D. That the effect of Pan Ark's successful bid was to create a monopoly in Pan Ark, in the services of repair and maintenance of aircraft and student flying instruction and constituted a violation of 15 U.S.C. §1.

The admitted facts are:

1. The plaintiff's lease by its terms expired on June 31, 1977.
2. The bid proposal required the successful bidder to construct a new hangar to replace hangar No. 4.
3. Pan Ark already had a building on its leasehold.
4. Pan Ark desired to have and made plans to provide additional hangar space on its present leasehold. Pan Ark bid on the plaintiff's former leasehold with the intent that if it was the successful bidder, it would erect the new hangar it desired on plaintiff's former leasehold.
5. That plaintiff refused to comply with

that portion of the bid proposal which required that the City demolish the existing hangar No. 4 and that the successful bidder would provide a new building on the plaintiff's former leasehold.

6. After Pan Ark was awarded the lease on plaintiff's former leasehold, there remained two fixed base operators, Pan Ark and Flower Aviation, both of whom were authorized to engage in and compete for repair and maintenance of aircraft and the giving of student instruction.
7. The Pan Ark lease contains no provisions giving Pan Ark the exclusive right to engage in the repair and maintenance of aircraft and the giving of flying instruction.
8. The Pan Ark lease does not exclude any other person from applying for a lease on unleased land at the airport to engage in fixed base operations, including the furnishing of those services and nothing in the lease of the two remaining fixed base operators prevents the City from entertaining such a proposal and submitting it for public bid.

Upon these admitted facts, the Court concludes that the granting of the lease to Pan-Ark did not create a monopoly in the services of repair and maintenance of aircraft and student flying instruction in violation of 15 U.S.C. §1.

The Court concludes that the defendant's motions for

summary judgment of dismissal of the Fifth Claim should be granted.

ORDER

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment of dismissal are hereby granted and that final judgment of dismissal of this action and the complaints therein with prejudice shall forthwith enter as to all defendants and that final judgment in favor of the defendants and against the plaintiff for the defendants' costs to be taxed by the Clerk of the Court upon the filing of a bill of costs within ten days from this date, be forthwith entered.

Entered this 26th day of September, 1980.

BY THE COURT:

/s/ Judge Chilson
Senior United States District Judge

APPENDIX D

The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

Colorado Revised Statutes §41–4–101 is set out in Appendix D.

APPENDIX E

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, 15 U.S. Code §1.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act, 15 U.S. Code §14.

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No. 82-352

In The

Supreme Court of the United States

October Term, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner,

vs.

THE CITY OF PUEBLO, COLORADO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Facts

The findings of fact determined by the trial court and affirmed by the Tenth Circuit and upon which the trial court concluded that each of Petitioner's antitrust claims was without substance and upon which the trial court found no specific facts existed showing that there is a genuine issue for trial, are set forth in substantial detail in *Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado,* 498 F. Supp. 1205 (1980) and 679 F. 2d 805 (1982) at 806-807.

In 1948 City acquired from the federal government by deed a tract of land which had been used as a military airfield during World War II, granted for the specific purpose of establishing a municipal airport. At the time of acquisition, there were certain facilities available to City on the premises for airport operations including hangars and a storage facility to store aviation fuel. Since prior to 1970, City granted leases to three "fixed base operators" who operated businesses upon specific portions of the airport lands so leased and performed specific services which were monitored by City, including refueling of aircraft, sale of new and used aircraft, repair and maintenance of aircraft, sale of aircraft parts and supplies, rental and charter of aircraft, conduct of a flying school, operation of food vending machines, storage of aircraft, and the manufacture of aircraft parts and components. The lease agreements with each of the "fixed base operators" required them to purchase all aviation fuel from City for resale. The three fixed base operators were defendants Pan-Ark, Flower Aviation and the plaintiff-petitioner, Pueblo Aircraft.

In 1970, Willard J. Teel and Betty I. Teel acquired all of the stock of Pueblo Aircraft and thereafter actively managed a fixed base operation under the lease granted by City, which was entered into in 1967 and extended in 1972 for an additional five years under an option contained in the original lease and expired on March 31, 1977, but was extended to June 31, 1977.

Several months prior to the expiration of Pueblo Aircraft's lease, City determined to require public bidding for the lease, upon its termination, of the premises and im-

provements leased to Pueblo Aircraft. The City on March 14, 1977 adopted a Resolution stating that the City was committed to compliance with Title VI of the Civil Rights Act and made all leases for use of airport facilities and property subject to solicitation of bids including notification of the Colorado Economic Development Association, an affiliate office of the Office of Minority Business Enterprises. The only bidders were Pueblo Aircraft and Pan-Ark. Pueblo Aircraft's bid contained exclusions to the proposals for bids and Pan-Ark's bid contained no exclusions. Pan-Ark was declared the successful bidder and City authorized a lease of the premises formerly occupied by Pueblo Aircraft to Pan-Ark commencing July 1, 1977.

City, at all times following acquisition of the airport, assumed control and responsibility for providing and maintaining the storage facility, monitoring the quality of fuel, providing fire protection and assuring the supply of aviation fuel to serve the needs of the fixed base operators and other aircraft using the airport who were not supplied by the fixed base operators. All leases entered into between City and the fixed base operators required the operators-lessees to purchase all aviation gasoline or propellants dispensed by them from City. The storage facility was on the premises when the property was acquired by the City. It was an underground fuel storage facility located away from the buildings and ramp area, and City daily monitored the fuel in order to assure its quality before it was dispensed to the fixed base operators. The City purchased the fuel through competitive bidding. At no time did any fixed base operator offer to construct its own storage facility on the airport premises so as to obtain aviation fuel independent of City.

All three fixed base operators were authorized by their respective leases to engage in all of the same activities including fueling and lubrication, maintenance and repair of aircraft and giving student flying instructions.

Course of Proceedings

The trial court granted Respondents' motion for summary judgment on all Petitioner's antitrust claims "based upon extensive pleadings, voluminous depositions, documents, affidavits filed in support of and in opposition to the motions, brief of the respective parties, and an open court hearing." *See Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado*, 679 F. 2d 805, 806.

The Tenth Circuit affirmed the granting of summary judgment on grounds of state action immunity, that no genuine issue of material fact existed, and that each antitrust claim was without substance. Both the trial court in entering a summary judgment and the Tenth Circuit in affirming the granting of summary judgment were aware of and took into consideration the Supreme Court's general rule that summary procedures should be used sparingly in antitrust litigation. *See Id.*, at 806.

REASONS FOR DENYING WRIT

I.

The entry of summary judgment based upon the factual record disposes of the instant case.

The trial court considered the motions for summary judgment separately as to each of Petitioner's antitrust

claims. After such specific consideration and factual analysis he determined no alleged conspiracy, monopoly, or antitrust violation existed. *See Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado,* 498 F. Supp. 1205. His review of the entire record before him revealed no facts which directly or by inference support the Petitioner's allegation that Respondents entered into a conspiracy to eliminate Petitioner as a competitor in the major services provided at the airport by fixed base operators or support the allegation that the overt acts set forth in the complaint were done in furtherance of such a conspiracy. *See Id.,* at 1213. The trial court further found that the granting of the lease to Pan-Ark did not create a monopoly in the services of repair and maintenance of aircraft and student flying instruction as alleged by Petitioner. *See Id.,* at 1216.

Even if the Supreme Court granted certiorari to review only the state action antitrust immunity question presented for review and reversed the Tenth Circuit on such question, the decision of the Tenth Circuit in the instant case would remain final and in effect. Neither the trial court's entry of summary judgment nor the Tenth Circuit affirmance thereof on the factual record conflicts with any decision of another court of appeals or of the Supreme Court.

Previous decisions of the Supreme Court on the question of state action antitrust immunity did not involve cases wherein the trial court found on the factual record that no antitrust laws had been violated. *See Community Communications Co. v. City of Boulder,* 102 S. Ct. 835 (1982), *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. 97, *City of Lafayette v.*

Louisiana Power & Light Co., 435 U. S. 389, *New Motor Vehicle of California v. Orrin W. Fox Co.*, 439 U. S. 96, *Bates v. State Bar of Arizona*, 433 U. S. 350, *Cantor v. Detroit Edison Co.*, 428 U. S. 579.

II.

The Tenth Circuit's decision in the instant case acknowledged and followed decisions and underlying policy of the Supreme Court on state action immunity.

The Tenth Circuit did accept and follow the state action immunity standards and underlying policy set forth by the Supreme Court in *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982), as explained and adopted in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978).

City of Lafayette does not necessarily require a municipality "to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit." The Supreme Court agreed with the Court of Appeals in *City of Lafayette* and concluded "that an adequate state mandate for anticompetitive activity of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U. S. at 415.

The Tenth Circuit examined and interpreted the language of Colorado Revised Statutes, 1973, § 41-4-101 and 201 *et seq.* *See Appendix A, Brief of Amici Curiae* and

determined the State of Colorado by affirmative legislative action granted municipalities an exemption from operation of federal antitrust laws. *See Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado,* 679 F. 2d at 809. The Tenth Circuit also cited with approval the Colorado Supreme Court decision in *Rocky Mountain Motor Co. v. Airport Transit Co.,* 124 Colo. 147, 235 P. 2d 580, wherein the Court referred to those airports operated by municipalities under the authority of the Statute as airports operated as a ". . . governmental function assigned to it to enforce the general policy of the state in the administration of general laws." 238 P. 2d at p. 586.

Both the Tenth Circuit and the Colorado Supreme Court in interpreting the Statute in question determined operation of airports by municipalities to be the policy of the state and when a municipality operates an airport under the Statute it acts as an instrumentality of the state in performance of a state function.

That Statute empowers municipalities to operate and manage airports and specifically grants to such municipalities jurisdiction and power to regulate the use of such airports, to enact and require fees, charges and tolls, to provide rules and regulations covering the use of such airports and facilities and the use of other property or means of transportation within or over such airports, and to lease or assign space or area necessary or useful in connection therewith. *See Appendix A, Amici Curiae Brief.*

Based upon the language of the Statute and the authority given municipalities to operate airports thereunder, the Colorado legislature certainly "contemplated the kind of

action complained of" by Petitioner. *See City of Lafayette,* 435 U. S. at 415.

The legislature by such Statute did "sanction anti-competitive municipal activities and thereby immunize municipalities from antitrust liability." *See City of Boulder,* 102 S. Ct. at 840.

The language of the Statute and interpretation given it by the Tenth Circuit and Colorado Supreme Court constitutes a "clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service" through the instrumentalities of municipalities at municipally operated airports. *See City of Lafayette,* 435 U. S. at 414, *City of Boulder,* 102 S. Ct. at 840.

The Statement of the Tenth Circuit in the instant case that under the Statute in question the operation of airports by municipalities are "public, governmental functions" was not meant by the Tenth Circuit to be the basis of state action immunity as discussed by Chief Justice Burger in his concurring opinion in *City of Lafayette.* The Tenth Circuit by such language merely emphasized that the City of Pueblo was acting in its governmental capacity "as an arm of the state for the public good on behalf of the state rather than iteslf." 679 F. 2d at 810. Such statement represents a prior logical determination before the Court could reasonably conclude the City was acting in furtherance of state policy. For if the City acted solely on its own behalf "for purely parochial interests", it could not have acted as an agent or instrumentality of the state.

Neither the *City of Lafayette* nor its progeny mandate statutory language directing each specific anticom-

petitive activity complained of. To argue that such a mandate must exist before state action immunity applies, would, for all practical purposes, nullify the rationale of the *City of Lafayette* and thwart the acknowledged function of "municipalities as instrumentalities of the state for the convenient administration of government within their limits." *See City of Lafayette,* 435 U. S. at 413.

Few legislative acts empowering municipalities to perform activities in furtherance of state policy are couched in antitrust language. Antitrust laws in all their complex procedural, factual and substantive aspects should not decide how municipalities are to exercise zoning, licensing, or other police powers. Virtually all municipal regulations and the performance of ordinary, convenient, and reasonable municipal activities have some anticompetitive effect, even if slight.

In order for municipalities to maintain their historic purpose and to continue to exist as separate but integral parts of government available to perform delegated activities as instrumentalities of the state and to function reasonably as local government entities, *City of Lafayette* should not be expansively applied.

CONCLUSION

The Tenth Circuit's decision in the instant case neither limits, expands or conflicts with the Supreme Court's prior decisions and announced policy on state action immunity. The Tenth Circuit properly applied the law and facts in

affirming the trial court's entry of summary judgment against Petitioner. The Tenth Circuit decision as written should be allowed to stand and the petition for certiorari should be denied.

Respectfully submitted,

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No. 82-352

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ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner

versus

THE CITY OF PUEBLO, COLORADO, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner now replies to new matters raised in the Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Respondent, the City of Pueblo, Colorado (hereinafter referred to as "Pueblo"), asserts that the opinion of the Tenth Circuit simply affirmed the district court's summary judgment on the facts. Nothing could be further from the truth.

The district court did rule that even if Pueblo were not immune from the antitrust laws, summary judgment on the

facts was appropriate. However, the Tenth Circuit very carefully avoided affirming the district court on these grounds. In its opinion, the Tenth Circuit said:

> ...We rely upon the District Court's detailed Opinion and Order of September 26, 1980, in affirming the District Court's grant of summary judgment to the *remaining defendants.* [Emphasis added.]
> p. A-7 of the Petition.

The "remaining defendants" were all the defendants *except* Pueblo. The Tenth Circuit was careful *not* to affirm summary judgment on the facts as to the City of Pueblo. After making the statement quoted above, the Tenth Circuit went into a lengthy discussion of municipal antitrust immunity. Had the Tenth Circuit intended simply to affirm a summary judgment on the facts, there would have been no need for it to issue a lengthy opinion on municipal antitrust immunity.

One is constrained to wonder precisely what the Tenth Circuit meant in its affirmance on the merits, and why that court excluded the City from such affirmance. It might be urged that as to certain claims the City might be liable even though the private defendants are not, as for example for the tying claims that the City (but not the other defendants) monopolized the sale of aviation fuel on the airport by requiring all operators to purchase all their fuel requirements only from the City. Or it might be suggested that the appellate court was concerned that the private defendants have a weaker claim to immunity, and so the court wished to buttress its d[illegible]ion as to them.

In any event, the Tenth Circuit recognized that the district court's summary judgment on the facts with respect to Pueblo, if not to the other defendants, was clearly wrong. So it did not affirm that portion of the district court's ruling.

But even if the Tenth Circuit had affirmed summary judgment on the facts by the district court, that affirmance was error. Petitioner's first two claims for relief against Pueblo alleged that the City of Pueblo entered into an illegal tying contract with petitioner in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 14. In its ruling on summary judgment as to these claims (pp. A-33 and A-34), the district court ignored the standards under the Sherman Act as set forth by the Supreme Court in *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958), and in *Fortner Enterprises* v. *U.S. Steel,* 394 U.S. 495 (1969). Note as one example the district court's use of the rule of reason rather than a *per se* approach in analysing the tying claim. And the Tenth Circuit in its ruling conflicted with the established law on the Clayton Act as discussed in *Moore* v. *J. A. Matthews & Co.,* 550 F.2d 1201 (9th Cir. 1977). Since the district court did not even make an acceptable legal analysis of plaintiff's first two claims, it would have been error worthy of certiorari for the Tenth Circuit to have affirmed the district court on this point.

Moreover, the Tenth Circuit's holding on the merits is *dictum.* Since the court found the city immune, there in fact existed no case or controversy on the issue of liability. Thus, reversal on the immunity issue by the Supreme Court should result in a remand requiring reconsideration of the liability issue standing alone.

Finally, there are policy considerations suggesting a grant of certiorari in the instant case. Simply put, an appellate court should not be permitted to "back door" a major opinion—which on its face appears to be inconsistent with prior Supreme Court decisions—merely through the use of a so-called "alternative holding" which is really dictum and not supported by proper analysis, and which decides an issue the court did not have to reach.

Petitioner respectfully prays for a writ of certiorari to enable this Court to review this matter.

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NO. 82-352

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Supreme Court of the United States
October Term, 1982

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CITY OF PUEBLO, COLORADO, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATE OF COLORADO AND THE STATES OF ALASKA, ILLINOIS, IOWA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OKLAHOMA, RHODE ISLAND, VERMONT, AND WISCONSIN IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether state statutes merely granting subordinate governmental units certain general powers to act in a particular subject-matter area and declaring the exercise of such powers to constitute "public, governmental functions" are, without more, sufficient to confer state action antitrust immunity upon those governmental units *whenever* they exercise those powers in *any* anticompetitive fashion?

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INTEREST OF THE AMICI CURIAE STATES

"The heart of our national economic policy long has been faith in the value of competition . . .," *Standard Oil Co. v. FTC*, 340 U. S. 231, 248 (1951), which is viewed as ultimately resulting in the better allocation of resources, lower prices, higher quality goods and services, and greater material progress in general. *See National Society of Professional Engineers v. United States*, 435 U. S. 679, 695 (1978); *Northern Pacific Railway v. United States*, 356 U. S. 1, 4 (1958). The national "commitment" to the policy of free and open competition in the marketplace is reflected in the antitrust laws, *see Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 843 (1982), which have been deemed essential to the "preservation of . . . our free enterprise system . . . ." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

In light of the preceding, it is not surprising that numerous states have likewise adopted their own general antitrust statutes to ensure competition within their boundaries. Often those state antitrust acts are construed in accordance with federal judicial decisions interpreting corresponding provisions of the federal antitrust laws,[1] and generally they are enforced by state attorneys general.[2] Additionally, under the federal antitrust laws the several states are authorized to bring private enforcement actions

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1 *See, e. g.*, Colorado v. North Avenue Furniture and Appliance, 645 P. 2d 1291 (Colo. 1982); Grams v. Boss, 97 Wis. 2d 332, 294 N. W. 2d 473 (1980); Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P. 2d 833 (1976); Oates v. Eastern Bergen Co., 113 N. J. Super. 371, 273 A. 2d 795 (1971); Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 234 N. W. 453 (Minn. 1931).

2 *See, e. g.*, Colo. Rev. Stat. 1973, §§ 6-4-104 and 105 (Cum. Supp. 1981); Del. Code Ann., tit. 6, § 2113 (Supp. 1979); Ill. Rev. Stat. ch. 38, §§ 60-30 *et seq.* (1979); Md. Com. Law Code Ann., §§ 11-201 to 213 (1975); Neb. Rev. Stat., § 59-1603 (Cum. Supp. 1978).

for damages and injunctive relief on their own behalf, 15 U. S. C. §§ 15 and 26, *see Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260-62 (1972), and, through their attorneys general, on behalf of their individual residents. 15 U. S. C. §§ 15c-h.

The *amici* states thus have a fundamental interest in seeing that the antitrust laws are given broad application at both the state and national levels in order to foster a competitive economic environment. The instant case has a direct, immediate and negative precedential impact on such interest. The ruling of the United States Court of Appeals for the Tenth Circuit in this case would, in effect, immunize from antitrust scrutiny all of the more than 80,000 subordinate governmental units in this country,[3] and those multitudinous private entities with whom they deal,[4] for all actions taken pursuant to any statutory authority whatever. If vested with such virtually automatic and blanket exemption, those units and entities would be able to engage with impunity in anticompetitive conduct. This would, inevitably, have a severely disruptive effect upon the nation's economic system. Consequently, the essential concern of the *amici* states with obtaining the bene-

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3 As of 1982, the most recent year for which figures are available, there were 38,872 cities, townships and counties, 28,733 special districts and 15,032 independent school districts in the country, for a total of 82,637 local governmental units nationwide. See Preliminary Report No. 1, United States Bureau of the Census, 1982 Census of Governments, Governmental Units in 1982 [hereinafter cited as Preliminary 1982 Census of Governments] at 4, Table 1 (1982).

4 The Tenth Circuit ruled in its opinion below that if the antitrust claims against a city must fall because it has immunity, then all associated antitrust claims against the private enities who are the city's alleged co-conspirators must likewise fall. See Pueblo Aircraft Service, Inc. v. City of Pueblo, 679 F. 2d 805, 806, 808 (10th Cir. 1982).

fits of competition for themselves and their citizenry has been adversely affected by the decision of the court below.

STATEMENT OF THE CASE

Facts

In 1948 the city of Pueblo, Colorado, in accordance with Colo. Rev. Stat. 1973, § 41-4-201 (included in appendix A hereto), acquired a former military airfield from the United States government in order to establish a municipal airport there. *See Pueblo Aircraft Service, Inc. v. City of Pueblo,* 679 F. 2d 805, 806 (10th Cir. 1982). Since prior to 1970 the city, in accordance with Colo. Rev. Stat. 1973, § 41-4-204 (included in appendix A hereto), leased portions of the airport and its facilities to three fixed base operators ("FBOs")—Pueblo Aircraft Service, Inc. ("Pueblo Aircraft"), Pan-Ark Aviation, Inc. ("Pan-Ark"), and Flower Aviation, Inc. ("Flower")—who, in turn, provided certain services and supplies to airport users. *See id.* at 806-07.

Under their separate lease agreements with the city, all three FBOs were authorized to engage in providing the same specified services and supplies to the public and were required to purchase from the city at the same predetermined price all aviation fuel made available by them for resale to airport users. *See Pueblo Aircraft Service, Inc. v. City of Pueblo,* 498 F. Supp. 1205, 1208 (D. Colo. 1980). In practice, however, only Pueblo Aircraft and Pan-Ark engaged in maintaining and repairing aircraft and conducting flying lessons at the airport, while only Pueblo Aircraft and Flower provided aircraft fueling and lubrication services there. *Id.* at 1212.

Several months prior to the scheduled March 31, 1977, expiration of Pueblo Aircraft's lease, the city decided to put out for public bid a new FBO lease for the premises

and facilities then occupied by Pueblo Aircraft. However, only Pan-Ark and Pueblo Aircraft submitted bids in response to the city's solicitation, and Pan-Ark's bid was accepted. On July 1, 1977, Pan-Ark entered upon a new lease with the city for the premises and facilities at the airport which, until then, had been occupied by Pueblo Aircraft pursuant to an extension of its lease. 679 F. 2d at 807. Thus, Pan-Ark became the sole FBO providing maintenance and repair of aircraft and conducting flying lessons at the airport, and Flower became the only FBO offering fueling and lubrication services there. *See* 498 F. Supp. at 1212.

Course of Proceedings

After losing its lease, Pueblo Aircraft filed the instant action in federal district court in Denver, Colorado, against, *inter alia*, the city of Pueblo, Pan-Ark and Flower. *See id.* at 1206-07. The complaint alleged that the exclusive fuel-purchase requirement constituted an illegal tying arrangement in violation of § 1 of the Sherman Act and § 3 of the Clayton Act, 15 U. S. C. §§ 1 and 14; that the defendants had conspired to eliminate Pueblo Aircraft as a competitor at the airport in violation of Sherman 1; and that the effect of the bidding process and subsequent lease was the creation of a monopoly in Pan-Ark for aircraft maintenance and repair services and student flying instruction in violation of Sherman 1. *See id.* at 1211-13, 1216.

Subsequent to the consensual dismissal of the claims against Flower, *id.* at 1207, the district court granted summary judgment for the remaining defendants, ruling, *inter alia*, that the city had state action immunity from the antitrust laws. *Id.* at 1210-11. In reaching that conclusion the court relied primarily on Pueblo's status as a home

rule city, citing the decision of the Tenth Circuit in *Community Communications Co. v. City of Boulder*, 630 F. 2d 704 (10th Cir. 1980). *See* 498 F. Supp. at 1209-10. Additionally, though, the district court characterized the city as "acting in a *governmental and not* in a *proprietary* capacity . . ." because state statutes authorized cities to acquire and operate airports and declared such actions to be "public, governmental functions." *Id.* at 1210 (emphasis added).

On appeal, the Tenth Circuit noted that the home rule aspect of the district court's opinion could not withstand scrutiny in light of this Court's subsequent reversal of the *City of Boulder* case, 102 S. Ct. 835 (1982). Nevertheless, citing Colo. Rev. Stat. 1973, § 41-4-101 (included in appendix A hereto), the Tenth Circuit affirmed the finding of immunity on what it termed the district court's "alternative" theory of "specific statutory authorization" conferring on cities the power to acquire and operate airports and declaring such activities to be "public, governmental functions." 679 F. 2d at 807-08.

Following the Tenth Circuit's denial of Pueblo Aircraft's petitions for rehearing and for rehearing *en banc* (*see* appendix B to Petition for *Certiorari*), Pueblo Aircraft has petitioned this Court for a writ of *certiorari*.

REASONS FOR GRANTING WRIT

The instant action constitutes the next logical development in the unfolding *City of Lafayette*[5] - *City of Boulder*[6] line of state action immunity cases in that it pre-

5 City of Lafayette v. Louisiana Power & Light Co., 435 U. S. 389 (1978).

6 Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

sents questions of law not explicitly resolved in either decision.

Notwithstanding the foregoing, the Supreme Court's opinions in those two cases do provide guidance in this situation. Nevertheless, three months to the day after its previous state action decision was reversed by this Court in *City of Boulder,* the Tenth Circuit here flatly refused to follow the Court's *Boulder-Lafayette* teachings. Thus, for the second time in two years the Tenth Circuit has gone out of its way to find a Colorado city to have antitrust immunity on bases which have not previously been embraced by this Court and which fly in the face of both the precedent and policy expressed in this Court's prior rulings. In so acting, the Tenth Circuit has contributed to widening splits of authority among the lower federal courts.

In light of the preceding, the instant case presents important state action immunity issues which require decision by the Supreme Court. Consequently, *certiorari* should be granted in order that this Court may clarify the application of state action immunity principles to subordinate governmental units.

I. THE TENTH CIRCUIT'S DECISION DISREGARDS, AND ITS CONCOMITANT EFFECTS ARE THE PRODUCT OF THAT DISREGARD FOR, THE APPLICABLE GENERAL TEACHINGS AND UNDERLYING POLICY OF THE SUPREME COURT'S SEMINAL DECISIONS ON STATE ACTION IMMUNITY IN THE CITY OF LAFAYETE AND CITY OF BOULDER CASES.

In the landmark case of *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978), the Supreme Court ruled that cities do not automatically have antitrust immunity under *Parker v. Brown,* 317 U.S. 341 (1943), just because they are governmental entities. In

an equally significant decision just this year in *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982), the Court held that even home rule municipalities vested with all the legislative power of the state over local and municipal affairs have no blanket immunity from the antitrust laws. Notwithstanding these teachings, the court below ruled in effect that subordinate governmental units have automatic and blanket antitrust immunity whenever they engage in any anticompetitive activity in an area where they have statutory powers to act, at least if those powers can be deemed to be "public and governmental" in nature. *See Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F. 2d 805 (10th Cir. 1982).

Although the instant case involves statutes applicable by their terms only to Colorado counties, cities and towns, and to the particular subject of airports, the impact of the Tenth Circuit's decision is nowhere near so limited. Within the State of Colorado alone, the opinion extends to immunize all 1,567 counties, municipalities, and school and other special districts[7] whenever they act in any of the myriad areas where they have any statutory powers, at least as long as such powers can be characterized as "public, governmental functions." The ruling does the same for the 7,303 counties, municipalities, townships and school and special districts within the other five states in the Tenth Circuit.[8] Moreover, by its reasoning the Tenth Circuit's decision logically extends to all of the 80,000-plus units of local government in this country[9] as well.

As noted in *City of Lafayette*, while the activities of local governmental units impact on the national economic

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7 *See* Preliminary 1982 Census of Governments, *supra* note 3, at 4, Table 1 (1982).

8 See *id.*

9 *Id.* at 1, Table A.

system in a wide variety of ways, 435 U. S. at 407-08, the economic choices made by those entities are not necessarily likely to comport with the broader economic policies of the antitrust laws. *Id.* at 403. Thus, as stressed in *Boulder*, if those units are left free to make such choices based only on their own parochial self-interests and without regard for the nation's economic goals embodied in the antitrust laws, serious economic dislocation could result. 102 S. Ct. at 840. The finding of virtually automatic and blanket antitrust immunity here will indeed enable all the subordinate governmental units within Colorado, the Tenth Circuit and the nation to place their own economic self-interests ahead of the regime of competition which is the fundamental principle governing commerce in this country. *See* 435 U. S. at 398. Such a result is directly contrary both to the teachings of *Lafayette* and *Boulder* and to the procompetitive principles on which those decisions are founded, and is more far-reaching than that which this Court sought to avoid with its ruling in *Lafayette*.[10]

II. THE TENTH CIRCUIT'S DECISION PRESENTS IMPORTANT STATE ACTION IMMUNITY ISSUES WHICH THE SUPREME COURT HAS NOT PREVIOUSLY RESOLVED EXPRESSLY AND SHOULD NOW SETTLE.

A. The case at hand presents the question whether governmental entities must meet two distinct tests, or merely one of two alternative formulations of the same test, in order to qualify for state action immunity.

On several occasions in recent years the Supreme

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10 In City of Lafayette the Court principally sought to avoid the potential anticompetitive threat posed by almost 40,000 counties, municipalities and townships. *See* 435 U. S. at 407-08. In the case at bar the potential anticompetitive impact includes those now 40,000-plus entities and extends to the more than 40,000 school and other special districts as well.

Court has identified requisites which must be met before state agencies or instrumentalities may qualify for the so-called "state action exemption" from the antitrust laws. It is now the rule that cities and other subordinate governmental units may gain immunity for their anticompetitive actions only to the extent such conduct is engaged in "pursuant to" a "clearly articulated and affirmatively expressed" state policy, *Community Communications Co. v. City of Boulder*, 102 S. Ct. at 842, displacing competition with regulation or monopoly public service, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 413, where the challenged anticompetitive restraints are themselves "clearly articulated and affirmatively expressed" as part of that policy. *City of Boulder*, 102 S. Ct. at 841 n. 14.

The "clear articulation and affirmative expression" standard requires that the competition-displacement policy be forthrightly stated and clear in its purpose to permit the challenged restraints. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980). In order for the particular anticompetitive actions at issue to be engaged in "pursuant to" a state policy embodying such restraints, however, express legislative authorization is not needed. Rather, it must only appear from the authority given the governmental entity to operate in the particular area that there exists implied authorization[11] for the anticompetitive activity

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11 Such authorization can be implied only *where*, and to the *minimum extent*, *necessary* to make the state's competition-displacement scheme work. *See* Corey v. Look, 641 F. 2d 32, 37 (1st Cir. 1981). *See also* Cantor v. Detroit Edison Co., 428 U. S. 579, 597 (1976); City of Lafayette v. Louisiana Power & Light Co., 435 U. S. at 417 (Marshall, J., concurring), 426 (Burger, C. J., concurring).

in the form of legislative "contemplation" of the kind of action complained of. *See City of Lafayette*, 435 U. S. at 415.

Thus, it would seem that a two-pronged standard of "clear articulation and affirmative expression" on the one hand, and at least implied, if not express, "authorization" on the other, must be met before anticompetitive municipal actions can qualify for state action immunity. Nevertheless, in *Boulder* this Court appeared to at least suggest by negative implication that a finding of implied authorization (in the form of "comprehension" within the powers granted, or legislative "contemplation") for cities to engage in specific anticompetitive actions might satisfy the requirement of "clear articulation and affirmative expression" required by precedent. *See* 102 S. Ct. at 843.

In light of the preceding, it is unclear whether the "clear articulation-affirmative expression" and "contemplation" standards present separate and distinct tests, both of which must be satisfied in order for municipalities to qualify for antitrust immunity, or whether they simply represent alternative formulations of the same test, the meeting of either one of which will suffice for immunity. The instant case squarely presents that issue.

Colorado has adopted an express statutory scheme relative to the acquisition and operation of airports by cities. *See* Colo. Rev. Stat. 1973, §§ 41-4-201 to 205 (included in appendix A hereto). However, those statutes do not constitute a legislative policy which is forthrightly stated and clear in its purpose to permit (*i.e.*, they do not "clearly articulate and affirmatively express") the anticompetitive restraints alleged here—tying arrangements, conspiracies to eliminate competitors, and the granting of monopolies—at municipal airports. To the contrary, Colorado's policy is expressly procompetitive in

the latter regard, *see* Colo. Rev. Stat. 1973, § 41-4-201 (exclusive leases for aircraft maintenance and repair services at municipal airports prohibited), a fact conveniently ignored by both the trial and appellate courts in this case. With respect to the former restraints, the absence of any state policy at most indicates official neutrality and therefore cannot satisfy the "clear articulation and affirmative expression" requirement. *See City of Boulder*, 102 S. Ct. at 843.

Consequently, the only way in which the city of Pueblo can be held to have the immunity found by the Tenth Circuit is if legislative "contemplation" of its anticompetitive activities suffices for state action immunity and can be implied from the statutory scheme here, or if the mere characterization of those activities as "governmental" in nature is determinative. Indeed, those essentially were the bases for the Tenth Circuit's finding of immunity in the case at bar. *See* 679 F. 2d at 809.

B. The instant case presents the question whether the mere general grant of power to act in an area necessarily conveys state action immunity with respect to any exercise of that power.

Only two prior decisions of the Supreme Court have even touched on the efficacy of general grants of authority in conferring state action immunity on subordinate governmental units. Although in *City of Lafayette* express statutory authorization existed for cities to act in a particular area (utilities), this Court did not resolve whether the general statutes there at issue (included in appendix B hereto) actually were sufficient to confer immunity but instead affirmed a remand to the trial court for development of a factual record. *See* 435 U.S. at 413-15. Somewhat conversely, in *City of Boulder* the Court did decide as a matter of law whether antitrust

immunity existed, but that was in the context of general municipal home rule self-governing power and absent any express authority for cities to act in the particular subject-matter area involved (cable television). *See* 102 S. Ct. at 843.

Thus, the Supreme Court has never expressly ruled on the precise issue presented in this case: whether the general grant to a local government of authority to act in a particular subject-matter area *necessarily* confers state action immunity on that government *whenever* it exercises such authority in an anticompetitive fashion. Undeterred by the lack of explicit guidelines from this Court, however, the Tenth Circuit has seized the opportunity presented by the instant case to declare another Colorado municipality immune from the antitrust laws.

1. The Tenth Circuit's decision ignores the applicable general teachings of prior landmark decisions of the Supreme Court.

Notwithstanding the preceding distinctions from the instant situation, in the aforementioned two cases this Court has at least suggested that mere general grants of authority to subordinate governmental units are ineffective to confer antitrust immunity for particular types of anticompetitive conduct. In *City of Lafayette* the Court held that statutes simply authorizing municipalities to own and operate utilities, 435 U. S. at 391, *do not necessarily* immunize particular anticompetitive actions by cities with respect to such utilities. *See id.* at 413-15. Just this year in *City of Boulder* the Court went further, ruling that even the grant to cities of broad general power to act *cannot necessarily* immunize their exercise of that power to engage in specific anticompetitive actions. *See* 102 S. Ct. at 843.

In its opinion the court below has completely disregarded the foregoing teachings. Specifically, the Tenth Circuit has held that, at least when viewed as "public and governmental" in nature, a mere general grant of authority to municipalities (here, to acquire and operate airports) *necessarily* carries with it legislative "authorization" to engage with impunity in specific anticompetitive conduct (such as imposing tying arrangements, conspiring to eliminate competitors and conferring monopolies).[12] Such a result flies directly in the face of the general precepts set forth by this Court in *Lafayette* and *Boulder*.

2. The Tenth Circuit's decision has contributed to a widening split among the federal courts of appeals.

Since *City of Lafayette* was decided in 1978, a significant number of federal appellate courts have had occasion to pass on whether the grant of mere general authority to act in a particular subject-matter area is sufficient to confer immunity when certain, not expressly authorized, anticompetitive actions are engaged in there. The Courts of Appeals for the First, Fifth, Seventh, Eighth and Ninth Circuits have all answered that question in the negative.[13] Conversely, however, in addition

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12 These are essentially the same types of conduct which failed to pass muster in City of Lafayette: tying arrangements and activities (such as sham litigation, restrictive covenants and long-term supply agreements) designed to prevent competition and preserve monopoly. *See* 435 U. S. at 392 n. 6.

13 *See* Corey v. Look, 641 F. 2d 32, 37 (1st Cir. 1981) (grant of authority to license ferry services insufficient to immunize monopolizing of or boycott in related parking market); Feminist Women's Health Center v. Mohammad, 586 F. 2d 530, 550 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979) (grant of authority to supervise practice of medicine insufficient to immunize use of such power to preclude practices not adjudicated illegal or improper); Whitworth v. Perkins, 559 F. 2d 378, 379-80 (5th Cir. 1977), *vacated and remanded sub nom.* City of Impact v. Whit-

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to the Tenth Circuit, the Third Circuit has recently answered that question in the affirmative.[14] Thus, a definite split of authority now exists among the federal circuits on this issue.

C. The case at bar presents the question whether the existence of state action immunity depends upon a finding that a governmental entity is acting in a "governmental" rather than a "proprietary" capacity.

The Tenth Circuit's finding of immunity in the instant case was partially predicated upon a so-called "proprietary-governmental" distinction as a test for state action immunity. Significantly, reliance upon such an analytical approach is nothing new for that court. In its opinion in the *Boulder* case the Tenth Circuit expressly distinguished *City of Lafayette*'s limitation on municipal antitrust immunity as being applicable only to "proprietary" activities and found the city of Boulder's supposedly "governmental" conduct immune. *See* 630 F. 2d at 708.

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worth, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979) (grant of zoning authority insufficient to immunize use of such power to restrain competition in sale of alcoholic beverages); Kurek v. Pleasure Driveway & Park Dist., 557 F. 2d 580, 590 (7th Cir. 1977), *vacated and remanded*, 435 U. S. 992, *reinstated on remand*, 583 F. 2d 378 (1978), *cert. denied*, 439 U. S. 1090 (1979) (grant of supervisory authority over golf course operation insufficient to immunize price fixing there); City of Kirkwood v. Union Electric Co., 671 F. 2d 1173, 1180 (8th Cir.), *pet'n for cert. filed*, 50 U. S. L. W. 3998.03 (U. S. June 11, 1982) (No. 81-2278) (grant of authority to charge regulated rates insufficient to immunize discriminatory charges to "price squeeze" competitor); Ronwin v. State Bar of Arizona, 1981-2 Trade Cas. (CCH) ¶ 64,414 (9th Cir. Dec. 14; 1981) (grant of authority to examine bar applicants insufficient to immunize use of such power to limit number receiving passing grades).

14 *See* Euster v. Eagle Downs Racing Ass'n, 677 F. 2d 992, 994-95 (3d Cir. 1982) (grant of general supervisory power over racing sufficient to immunize specific anticompetitive action of fixing jockeys' fees).

In the case at bar the Tenth Circuit, apparently seeking to divorce itself from its earlier opinion in *Boulder*, did not *explicitly* posit a proprietary-governmental distinction in its analysis. However, that court did base its finding of immunity on, *inter alia*, a legislative declaration that the questioned activity here was "governmental" in nature. *See* 679 F. 2d at 808. Additionally, as support for such conclusion the Tenth Circuit dusted off a series of pre-*Lafayette* state and federal court decisions dating back to 1898 differentiating between "proprietary" and "governmental" functions. *See id.* at 809-11.[15] Furthermore, the appellate court's quotation relative to "public, governmental functions" was taken from the same sentence of the district court's opinion wherein the lower court expressly concluded that the city of Pueblo was acting in a "governmental" *as opposed to* a "proprietary" capacity. *See id.* at 808, *quoting* 498 F. Supp. at 1210.

Despite the slightly less forthright approach, then, it is clear that in the instant case the Tenth Circuit once again utilized a proprietary-governmental distinction to find a Colorado city immune from the federal antitrust laws. Thus, the case at bar provides an opportunity for this Court explicitly to announce whether a subjective proprietary-governmental analysis serves any purpose in assessing a municipality's immunity from the federal antitrust laws.

1. The Tenth Circuit's opinion ignores the teachings of prior applicable decisions of this Court and further contributes to a split among the lower federal courts.

Apparently, the decisive vote of Chief Justice Burger

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15 It is noteworthy that the primary case relied upon by the Tenth Circuit in this regard, E. W. Wiggins Airways v. Massachusetts Port Auth., 362 F. 2d 52 (1st Cir. 1956), *cert. denied*, 385 U. S. 947 (1966), was expressly overruled last year. *See* Corey v. Look, 641 F. 2d 32, 37 n. 7 (1st Cir. 1981).

against antitrust immunity in *City of Lafayette* was predicated on his subjective perception of the activity there challenged as "proprietary" in nature. *See* 435 U. S. at 418-24 (Burger, C. J., concurring), 432-35 (Stewart, J., dissenting). It is clear, however, that the *Lafayette* plurality opinion focused not on the subjective nature of the activity but on whether the city was acting as an instrumentality of the state pursuant to a state policy displacing competition with regulation or monopoly public service. *See id.* at 408-18.

More significantly, in the two state action immunity cases decided by the Supreme Court between *Lafayette* and *Boulder*, neither the Chief Justice nor any other member of the Court made any mention of a supposed proprietary-governmental distinction. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U. S. 96 (1978). Both decisions involved what subjectively could be characterized as purely "governmental" activity: the regulation by governmental agencies of distribution schemes pertaining to certain products (wine in *Midcal* and automobiles in *Fox*). Nevertheless, immunity was found to exist for the supposedly "governmental" activity only in the one case (*Fox*) and not in the other (*Midcal*). If the proprietary-governmental distinction envisioned by the Tenth Circuit did, in fact, exist, both decisions would have resulted in a finding of immunity.

Midcal and *Fox* make clear, then, that the mere susceptibility of an activity to subjective categorization as "governmental" does not qualify it for state action immunity. Rather, it is the meeting of the case law-established requisites which entitles a particular activity to

such immunity. *See* 445 U. S. at 105; 439 U. S. at 109. Simply put, then, any subjective classification of activity as "proprietary" or "governmental" in nature is meaningless for purposes of antitrust immunity analysis.[16]

Thus, it is not surprising that in its opinion in *Boulder* this Court ignored the Tenth Circuit's explicit reliance on a proprietary-governmental distinction.[17] In resurrecting such distinction in the case at bar, the Tenth Circuit has continued to ignore the prior teachings of this Court and has further contributed to a split among the lower federal courts on this point.[18]

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16 Two very significant policy reasons support this Court's refusal to employ a proprietary-governmental distinction in state action immunity analysis. First, such an analytical approach would lead to anomalous immunity results: even though the anticompetitive effect could be exactly the same, a city would not have antitrust immunity if it operated its own company in a particular area but would be exempt if it simply allowed a private entity to operate in that area in exactly the same way under regulation by the city. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U. S. at 432-33 (Stewart, J., dissenting). Second, the wide range of services provided by governments in this day and age makes it almost impossible to determine what constitutes "proprietary" activity. *Id.* at 433-34 (Stewart, J., dissenting). Indeed, virtually any and all action by governments can subjectively be labeled "governmental." Community Communications Co. v. City of Boulder, 630 F. 2d at 717 (Markey, C. J., dissenting).

17 The only mention of a proprietary-governmental distinction in the Supreme Court's Boulder opinion was a passing reference to the fact that the Chief Justice had relied on such a distinction in his Lafayette concurrence. *See* 102 S. Ct. at 840 n. 13.

18 *Compare* In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1087-88 (N. D. Cal. 1979), Shrader v. Horton, 471 F. Supp. 1236, 1242 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980), and Cedar-Riverside Assocs. v. United States, 459 F. Supp. 1290, 1298-99 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assocs. v. City of Minneapolis, 606 F. 2d 254 (8th Cir. 1979) (utilizing proprietary-governmental distinction), *with* Grendel's Den., Inc. v. Goodwin,

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2. A determination that the acquisition and operation of municipal airports by cities are "public, governmental functions" is not sufficient, under the tests enunciated by this Court, to confer state action immunity upon cities engaging in such activities.

In this case the Tenth Circuit apparently concluded that, by declaring the acquisition and operation of municipal airports to be "public, governmental functions," the legislature intended to confer state action immunity upon cities whenever they engaged in such activities. The manner in which the Tenth Circuit arrived at this conclusion, however, does not comport with the analytical approach required by the prior decisions of the Supreme Court on state action immunity. As this Court indicated in *Boulder*, because only the federal government and the states are sovereign, other entities are immune from the antitrust laws only when carrying out a *state* competition-displacement policy. Assessing whether an entity's anticompetitive actions are manifestations of a state policy rather than

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662 F. 2d 88, *rev'd on reh'g on other grounds*, 662 F. 2d 102 (1st Cir. 1981), Corey v. Look, 641 F. 2d 32 (1st Cir. 1981), Feminist Women's Health Center v. Mohammad, 586 F. 2d 530 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979), Whitworth v. Perkins, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom.* City of Impact v. Whitworth, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979), Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,-029 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980), Highfield Water Co. v. Public Serv. Comm'n, 488 F. Supp. 1176 (D. Md. 1980), Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737 (N. D. Iowa 1979), *aff'd*, 671 F. 2d 1176 (8th Cir. 1982), City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320 (M. D. Ind. 1979), *aff'd in part, rev'd in part on other grounds*, 616 F. 2d 976 (7th Cir. 1980), *cert. denied*, 449 U. S. 1096 (1981), and United States v. Texas State Bd. of Pub. Accountancy, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979) (not utilizing proprietary-governmental distinction).

part of a purely individual plan to displace competition is precisely the purpose of the state action immunity tests which have been announced by this Court in recent years.

The Tenth Circuit in this case found the requisite state policy reflected in a mere declaratory statute enacted by the Colorado legislature in 1945. *See* 1945 Colo. Sess. Laws ch. 4, p. 38. However, it is inconceivable that, in adopting the "public, governmental functions" language some thirty-three years prior to the Chief Justice's concurring opinion in *City of Lafayette*, the legislature thereby intended to enact a competition-displacement policy sufficient to qualify for state action immunity. It is far more likely that by this declaration the legislature intended to ensure that in establishing and operating their airports, cities would have immunity from personal injury suits brought under state law, *see Schwalb v. Connely*, 116 Colo. 195, 179 P. 2d 667 (1947), and that they would have eminent domain power as well. *See Duff v. City and County of Denver*, 147 Colo. 123, 362 P. 2d 1049 (1961). *See also Rocky Mountain Motor Co. v. Airport Transport Co.*, 124 Colo. 147, 235 P. 2d 580 (1951). Consequently, the Tenth Circuit's conclusion in this regard is insupportable as a matter of statutory interpretation.

More importantly, that conclusion is totally inconsistent with the principle of federalism embodied in this country's dual system of sovereignty and upon which this Court's prior state action decisions are predicated. The reservation of sovereign powers to the federal government and the states ordinarily has the effect of limiting the serious economic disruptions which could result if the tens of thousands of local government units in this country were free to pursue their own economic self-interests. It is because of such potential for economic dislocation and dis-

ruption that this Court has restricted the instances in which state action antitrust immunity is available to subordinate governmental entities. *See City of Boulder*, 102 S. Ct. at 840; *City of Lafayette*, 435 U. S. at 402-08. However, rather than limiting cities' freedom to pursue their own self-interests, the Tenth Circuit's decision in this case leaves each city free to follow whatever economic policy it desires. The result, in effect, is that cities are elevated to the status of states, immune from the antitrust laws despite the fact they may be effectuating their own anticompetitive policies rather than acting pursuant to a state competition-displacement policy. Such result is the antithesis of that which the principle of federalism seeks to foster.

CONCLUSION

The Tenth Circuit's decision here would confer virtually automatic, blanket antitrust immunity not only on the 80,000-plus local government units in this country in the myriad areas where they have statutory powers, but also on the private entities who follow the dictates of those units in such areas. *See Cantor v. Detroit Edison Co.*, 428 U. S. 579, 592 (1976). For these and all the foregoing reeasons, this Court should grant *certiorari* and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

COLORADO REVISED STATUTES 1973

TITLE 41
AERONAUTICS: AIRCRAFT AND AIRPORTS

ARTICLE 4
AIRPORTS

PART 1
COUNTY AIRPORTS

41-4-101. Operation a governmental function. The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

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PART 2

AIRPORTS - CITIES AND TOWNS

41-4-201. Power to establish airports. The city councils and boards of trustees in towns have the power to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports and

landing fields for the use of airplanes and other aircraft either within or without such municipalities or may set apart and use for such purpose real property owned by such cities and towns. Any lands previously acquired by any town or city in the state of Colorado for park purposes may be used for any of the purposes specified in this section. On any airports so established, city councils and boards of trustees in towns shall grant no exclusive concession, license, or lease agreement relating to the business of servicing, repairing, or furnishing supplies for aircraft.

41-4-202. How lands acquired. Real property needed by a city or town for an airport or landing field shall be acquired by purchase if the city or town is able to agree with the owners on the terms thereof and otherwise by condemnation in the manner provided by law for acquiring real property for public purposes.

41-4-203. Power to incur indebtedness and to issue bonds. The city councils or boards of trustees in towns have the power to incur indebtedness for any of the purposes mentioned in this part 2 and to issue bonds for the acquisition, construction, and improvements of airports and landing fields and appurtenances thereto, in the same form and manner as debt is incurred and bonds are issued for other municipal purposes.

41-4-204. Jurisdiction to regulate use. In connection with the erection or maintenance of any such airport or air navigation facilities, any city or town, or any municipal corporation, has the power and jurisdiction to regulate the receipt, deposit, and removal and the embarkation of passengers or property to and from such landing

places or moorage as may be provided; to exact and require charges, fees, and tolls, together with a lien to enforce their payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate municipal aircraft; to employ pilots; to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the airport; to perform any duties necessary or convenient for the regulation of air traffic; to enter into contracts or otherwise cooperate with the federal government or other public or private agencies; and otherwise to exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air.

41-4-205. Funds may be raised by taxation. The city council or board of trustees may annually appropriate and cause to be raised by taxation in such city or town a sum sufficient to carry out the provisions of this part 2.

APPENDIX B

LOUISIANA REVISED STATUTES

TITLE 33
MUNICIPALITIES AND PARISHES

CHAPTER 2. LOCAL GOVERNMENT
PART VIII. INTERGOVERNMENTAL FUNCTIONS

§ 1326. ***Service agreements***

Any parish or municipality operating a gas, water, or electric light or power system, sewerage plant, or transportation system, may extend such services to persons and business organizations located outside its territorial bounds, or to any other parish or municipality. Such extension shall be in accordance with the terms of service agreements entered into by the parish or municipality supplying the service and the persons, business organizations, parishes, or municipalities receiving the service.

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CHAPTER 10. PUBLIC UTILITIES
PART I. OWNERSHIP, OPERATION, AND FINANCING

SUB-PART A. GENERAL POWERS

§ 4162. ***Power to own and operate; power to lease***

Any municipal corporation or any parish or any other political subdivision or taxing district authorized to issue bonds under Section 14 of Article 14 of the Constitution of Louisiana of 1921, may construct, acquire, extend, or improve any revenue producing public utility and property necessary thereto, either within or without its boundaries, and may operate and maintain the utility in the interest of the public.

A municipal corporation may lease waterworks systems, electric light and power plants, combined water and electric systems, garbage plants, sewerage works, electric street and interurban railways, gas plants and distributing systems.

No municipal corporation may lease or purchase gas fields, wells, lands, or holdings for the purpose of drilling and operating gas wells.

A parish may lease gas plants, gas distributing systems, gas wells, gas lands and holdings.

§ 4163. *Sale and distribution of commodity or service; establishment of rates and regulations*

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution.